

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Henry W. Hodges.
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1913.

No. 2542.

17

WILLIAM W. DEGGE, APPELLANT,

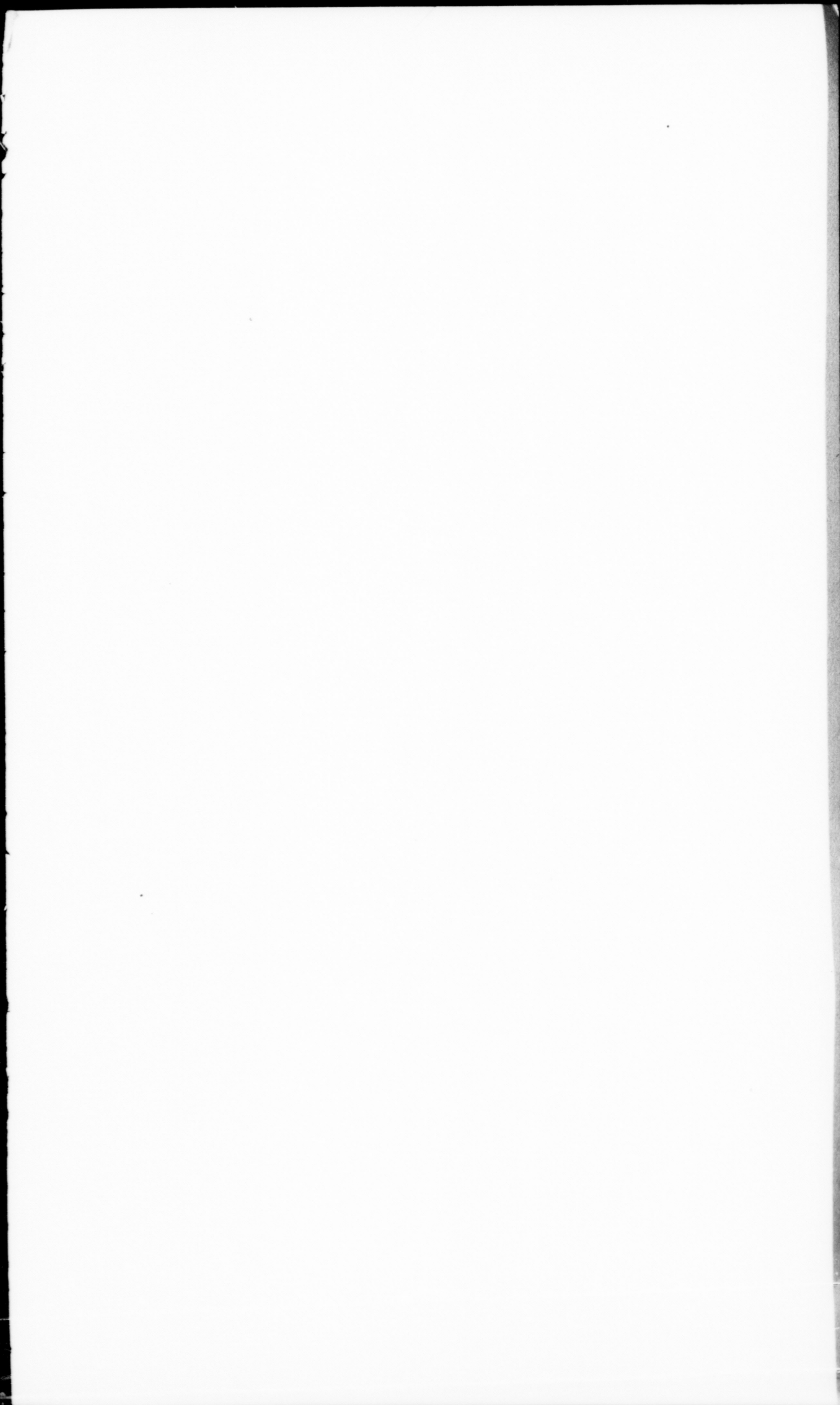
vs.

WILLIAM J. BAXTER, JR., TRUSTEE FOR
FRANCIS HATTON ET AL., APPELLEE.

BRIEF FOR APPELLANT.

A. LEFTWICH SINCLAIR,

Attorney for Appellant.



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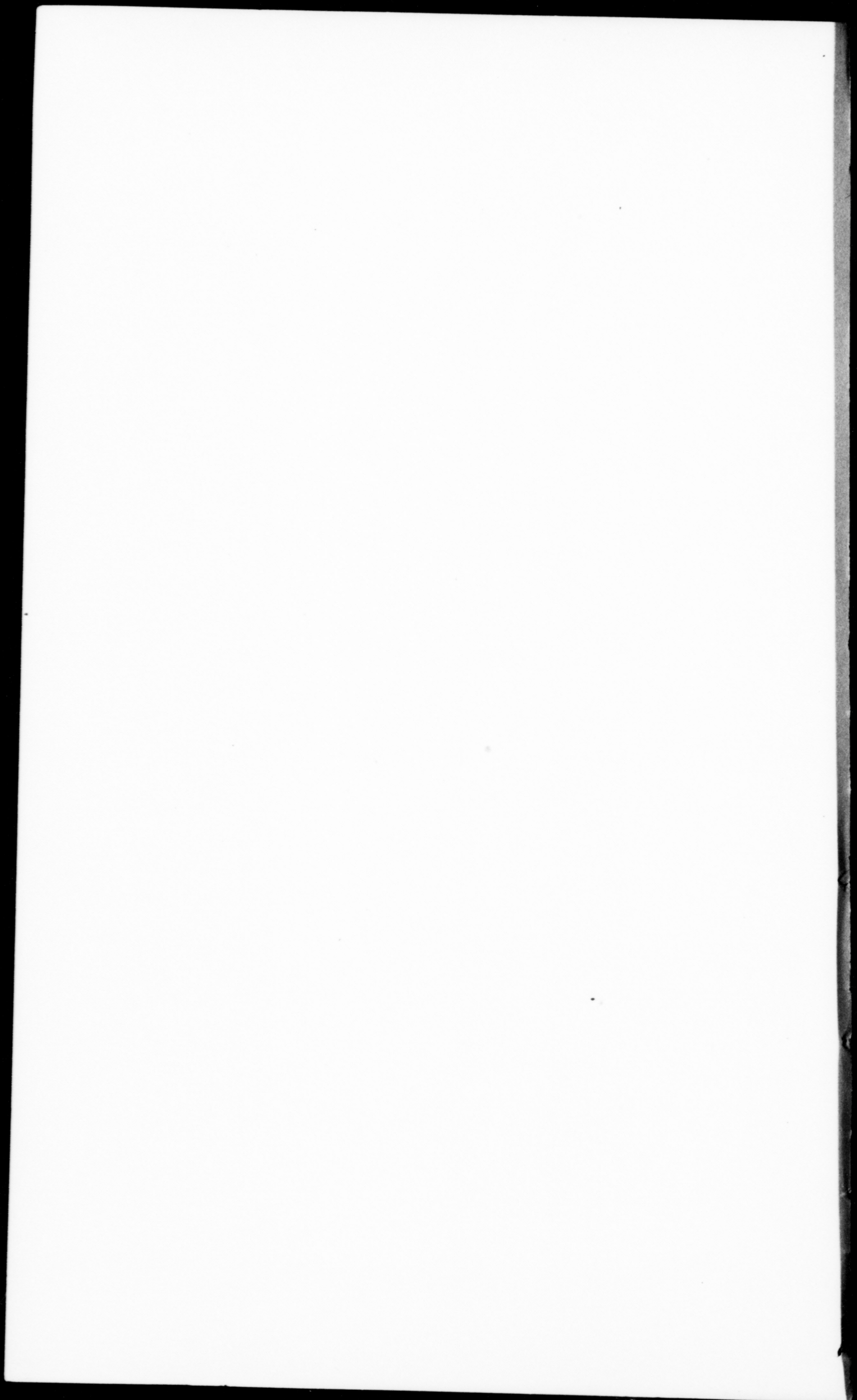
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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1913.

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WILLIAM W. DEGGE, APPELLANT,

vs.

WILLIAM J. BAXTER, JR., TRUSTEE FOR
FRANCIS HATTON ET AL., APPELLEE.

BRIEF FOR APPELLANT.

Statement of Case.

This action was instituted by the appellee in the court below upon a judgment recovered by him, as plaintiff, against the appellant, William W. Degge, as defendant, in the Court of Law and Chancery of the city of Norfolk, State of Virginia, on March 31, 1897, for the sum of \$4,500, with interest from December 31, 1896, and costs of suit, less a credit of \$1,375.07, which judgment is alleged in the amended declaration to remain unsatisfied and in full force (Rec., pp. 1-2).

To the plaintiff's amended declaration the defendant pleaded *nul tiel* record, and filed four special pleas, supported by affidavit, alleging:

(2) ". . . That he was never at any time served with any process in the suit wherein the judgment in the plaintiff's said amended declaration mentioned was obtained, and that he received no notice respecting said suit until long

after said supposed judgment was rendered, and that he never in any manner whatsoever appeared in said suit, in person or by attorney, or in anywise submitted to the jurisdiction of the court which rendered said supposed judgment, by reason whereof the said court had no jurisdiction of the person of this defendant."

(3) ". . . That the plaintiff ought not to have or maintain this action against him, because he says that at the time of the institution of the suit in which the supposed judgment sued on herein was obtained, it was provided in and by the laws of the State of Virginia that if any defendant be not found at his usual place of abode, he might be served with process by delivering a copy of the process, 'and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years.' This defendant says that no information whatever as to the purport of the summons or process issued in the aforesaid suit was ever given to the defendant, Nellie A. Degge, on whom a copy of said summons or process is alleged to have been served, and the said summons or process was never called to this defendant's attention, and that this defendant did not, nor did the said Nellie A. Degge receive any notice, information, or intimation respecting said suit until the spring of the year A. D. 1908, when this defendant received a letter from a firm of attorneys of the city of Denver, in the State of Colorado, to whom the said supposed judgment had been sent by the plaintiff for collection, demanding payment of said supposed judgment, by reason whereof the court which rendered said supposed judgment was without jurisdiction of the person of this defendant."

(4) ". . . That the plaintiff ought not to have or maintain this action against him, because he says that the summons or process was returned in the suit wherein the supposed judgment sued on herein was obtained, on the 18th day of January, A. D. 1897, and that the plaintiff first filed

his declaration in said suit on the first Monday in March, A. D. 1897; that at the time of the institution of said suit it was, and still is, provided in and by the laws of the State of Virginia as follows:

“ ‘Sec. 3241. When Clerk to Dismiss Suit.— If one month elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared.’ ”

“ This defendant says that under and by virtue of said provisions of said laws it became and was the ministerial duty of the clerk of the court in which said supposed judgment was entered, upon the failure of the plaintiff to file his declaration within one month after said summons or process was returned in said suit, to forthwith enter said suit dismissed; yet the clerk of said court, in disregard of his duty in that behalf, did not enter said suit dismissed, but, on his own motion, and without any action or order in the premises by the judge presiding in said court, undertook and pretended to continue the case for the plaintiff to file his declaration, until the first Monday in March, A. D. 1897, when said declaration was filed as aforesaid; that subsequently said clerk, without the intervention of the judge presiding in said court, undertook and pretended to enter the said supposed judgment, because of the supposed default of the defendants named in said suit. By reason of the premises, said supposed judgment was and is null and void and of no effect whatever.”

(5) “. . . That the plaintiff ought not to have or maintain this action against him, because he says that the supposed judgment sued on herein was obtained through fraud practiced by the plaintiff upon Nellie A. Degge and upon this defendant, and that this defendant and said Nellie A. Degge, on the 26th of February, A. D. 1909 (since the commencement of this action), instituted a suit in equity against the plaintiff and Edward Spalding,

William H. H. Trice, and Charles W. Fentress, the plaintiff's *cestuis que trust*, in the Circuit Court of the United States for the Eastern District of Virginia, to have said supposed judgment declared to be fraudulent and void and vacated and set aside, which said suit has not yet been heard, but is now pending in said court" (Rec., pp. 2-4).

The plaintiff joined issue upon the defendant's first plea (*nul tiel* record), and filed a demurrer to the second, third, fourth, and fifth pleas (Rec., pp. 5-6).

The demurrer was overruled as to the third and fourth pleas and leave was granted the defendant to amend the second plea. The demurrer was sustained as to the second and fifth pleas (Rec., p. 6).

The defendant thereupon filed an amendment to the second plea, and the plaintiff filed a demurrer thereto, which was overruled (Rec., pp. 6-8).

While Nellie A. Degge is named as defendant in the plaintiff's declaration, she was not served with process and did not appear in the case in person or by attorney, or in any way submit to the jurisdiction of the court.

The case was heard in the court below by Mr. Justice Wright, counsel for the parties having, by oral stipulation, waived a trial by jury and consented to a trial by the court (Rec., pp. 8-9).

The Evidence.

The plaintiff to prove the issues on his part joined offered in evidence, over the objection and exception of the defendant, a transcript of the record of the proceedings between the plaintiff and defendant in the Court of Law and Chancery of the city of Norfolk, in which the judgment sued on was recovered, and rested his case (Rec., pp. 9-13).

Counsel for the defendant thereupon moved the court

to find and enter judgment in favor of the defendant, upon the following grounds, to wit:

1. Because the judgment sued on was not properly attested or certified.

2. Because it appears upon the face of the record that the defendant was never at any time served with any process or notice in the suit wherein the judgment sued on was obtained and that the defendant never in any manner appeared in said suit, in person or by attorney, or in anywise submitted to the jurisdiction of the court which rendered said judgment, by reason whereof the said court did not have jurisdiction of the person of the defendant.

3. Because the record does not show that, at the time of the supposed service of process in the suit in which the judgment sued on was obtained, the defendant was a resident of the State of Virginia.

4. Because there is a fatal variance between the summons and the declaration in the suit in which the judgment sued on was obtained, in that the plaintiff, by said summons, sued and proceeded in his individual capacity against the defendant, while, by his declaration, of the filing of which the defendant was given no notice, the plaintiff proceeded and recovered judgment against the defendant in a representative capacity.

5. Because the judgment sued on was entered prematurely.

6. Because the promissory note mentioned in the declaration filed by the plaintiff in the suit in which said judgment was obtained was never filed or exhibited in said suit.

7. Because the delivery of the promissory note mentioned in the declaration filed in the suit wherein the judgment sued on was obtained was not set up or alleged in said declaration.

8. Because the declaration filed in the suit in which the judgment sued on was obtained was not verified.

9. Because the summons issued in the suit in which the judgment sued on was obtained, was fatally defective, null and void, for the following reasons, to wit:

(a) Because the Christian name of the plaintiff was not given therein.

(b) Because the Christian name of the defendant was not given therein.

(c) Because the docket number of the case was not given therein.

(d) Because the name of the plaintiff's attorney was not given therein.

(e) Because the place of appearance was not given therein.

(f) Because the said summons was not under the seal of the court from which it was issued.

(g) Because the time at which the defendant was commanded to appear was not stated in said summons with sufficient clearness.

(h) Because the residence of the defendant was not stated in said summons.

10. Because the return of service in the suit in which the judgment sued on was obtained is defective and legally insufficient, in that it does not show compliance with all the requirements of the law of the State of Virginia and fails to show service in said State of Virginia, and, further, because said return does not show the officer's inability to make personal service or that the officer used due diligence to find the defendant (Rec., pp. 13-14).

The court, however, overruled said motion to find and enter judgment in favor of the defendant and found in favor of the plaintiff; to which ruling the defendant duly noted and ~~excepted~~ *ion* (Rec., p. 14).

The defendant thereupon announced that he did not desire to offer any evidence and rested (Rec., p. 14).

Counsel for the respective parties thereupon entered into and submitted to the court the following stipulation, in writing:

"It is agreed by and between attorneys for the plaintiff, and for the defendant, William W. Degge, that, if the plaintiff is entitled to judgment, judgment should be entered in the above-entitled cause, in favor of the plaintiff, the amount for which such judgment should be entered, after the allowance of all just credits, is Two Thousand One

Hundred and Eleven and Sixty-Nine One-Hundredths (2,111.69) Dollars, with interest from January 6, 1897, until paid, together with the costs of the judgment had in the Law and Chancery Court of Norfolk, Virginia, said costs being \$12.25, and together with the costs of this suit" (Rec., p. 14).

The court having overruled the defendant's motion for a new trial, on January 31, 1913, entered judgment for the plaintiff for \$2,111.69, with interest from July 6, 1897, and costs. An appeal was thereupon taken by the defendant to this court (Rec., pp. 8-9).

Assignment of Errors.

The trial court erred:

1. In sustaining the plaintiff's demurrer to the defendant's fifth plea.
2. In admitting and receiving in evidence, over the objection of the defendant, the transcript of the record of the suit or proceedings in which the judgment sued on was recovered.
3. In finding for the plaintiff, over the objection of the defendant.
4. In not finding and entering judgment in favor of the defendant.
5. In overruling the defendant's motion for a new trial and entering judgment in favor of the plaintiff.

ARGUMENT.

I.

The judgment sued on, it is submitted, is not properly attested or certified.

It will be noticed that the declaration herein describes the judgment sued on by date, court, amount, credit, "and twelve and 25-100 (12.25) dollars costs, together

with the costs of this suit;" while the transcript of record discloses a judgment for the plaintiff for a certain amount "and his costs by him about his suit in this behalf expended."

Under the authorities, the averment of a judgment for a *specified amount of costs* is not supported by proof of a judgment awarding costs *generally*.

The record of a judgment for debt or damages certain "and all the costs," is not admissible in evidence, where the plaintiff declares upon a judgment for debt or damages certain, and all costs, *with an averment as to the amount of the costs*.

Butler *vs.* Owen, 7 Ark., 369.

Caldwell *vs.* Bell, 3 Ark., 419.

To the same effect are:

Wash *vs.* Foster, 3 Mo., 205.

Hight *vs.* White, 1 Morris (Iowa), 45.

Beecher *vs.* Chester, 2 Root (Conn.), 90.

In Lackland *vs.* Pritchett, 12 Mo., 484, the *narr* set out the judgment under a "*prout patet per recordum*," as a judgment for \$125, together with the plaintiff's costs in that behalf expended, which were averred to amount to the sum of \$10. The record offered in evidence showed a judgment for \$125 and costs *generally*, without specifying any amount. *Held*, to be a fatal variance.

A variance in the amount and in the names of the parties between the declaration on a judgment and the record as proved, is fatal.

Lawrence *vs.* Willoughby, 1 Minn., 65.

Where the averment is a judgment for a certain sum, and the evidence shows a judgment for such sum with interest, the variance is fatal.

Tompson *vs.* Jameson, 1 Cranch (U. S.), 282.

And see:

Whitaker *vs.* Bramson, 2 Paine (Fed.), 209.

Where the averment is a judgment for a sum certain, and the evidence discloses a judgment for costs, taxed at an amount left blank, there is a fatal variance.

Noyes vs. Newmarch, 1 Allen (Mass.), 51.
Summers vs. Mantz, Ga. Dec., 73.

What purports to be a statement of costs in the record (Rec., p. 12), is not covered by the clerk's certificate or attestation or by affidavit. It will be observed that the statement of costs appears *below* the certificate of the clerk (as in *Wash. vs. Foster*, 3 Mo., 205), and that no reference is made to the items of the costs anywhere in the certificate.

It is well settled that a bill of costs must be supported by affidavit.

11 Cyc., 158.

5 Am & Eng. Ency., Pldg. & Pr., 242.

The judgment is attested thus:

"Teste: Junius A. Coleman, D. Clerk."

"D. Clerk," it is submitted, can not be held to mean "Deputy Clerk."

Assuming that "D. Clerk" may be properly held to mean "Deputy Clerk," rather than "Docket Clerk," or "Desk Clerk," or something else, the attestation should have borne the name of the clerk, as well as that of the Deputy, thus: John Doe, Clerk, by Richard Roe, Deputy Clerk.

It has been held by the Virginia Court of Appeals, that where the return of process is signed only with the name of the deputy, by whom it has been served, and not with that of the principal also, such return and process should be quashed.

Mitchell vs. Comm., 89 Va., 826.

II.

It appears from the transcript of record, that the defendant William W. Degge was never personally served with process in the suit in which the judgment sued on was obtained. This fact, it is submitted, is alone fatal to the affirmance of the judgment of the court below.

The federal courts do not regard as valid a judgment in *personam* rendered by a State court for the recovery of a debt or demand, unless the defendant either entered a voluntary appearance or he or some one authorized to receive service of process for him was personally cited, within the jurisdiction of the court, to appear in the action.

St. Clair *vs.* Cox, 106 U. S., 350.

Pennoyer *vs.* Neff, 95 U. S., 714.

Thompson *vs.* Whitman, 18 Wall., 457.

Constructive service can not rightfully be substituted for the "direct and actual warning which every man ought to have before being condemned," and a sentence so pronounced is not a judgment in any just sense of the term, and should not be enforced by any court which is free from constraint.

2 Am. Leading Cases, 5th Ed., 654.

"The Constitution follows Magna Charta in declaring that no one shall be deprived of life, liberty, or property, without due process of law, and similar provisions are contained in the Constitutions of the several States. By due process of law we are to understand, agreeably to the definition given by Mr. Webster, in the Dartmouth College Case, 4 Wheat., 419, that law 'which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.' Banning *vs.* Taylor, 12 Harris, 289, 292. It has

accordingly been held that a judgment without notice, or, in other words, without such reasonable information of the institution of the suit as to give the parties an opportunity of being heard, is a nullity."

2 Am. Leading Cases, 655.

Even in the case of its own citizens or residents a State can not substitute a merely constructive service for actual personal citation.

Bowler vs. Huston, 30 Gratt. (Va.), 266.

Amsbaugh vs. Bank, 33 Kans., 100.

At the time of the commencement of the suit in which the judgment in question was recovered constructive or substituted service of process was provided for in the Virginia code as follows:

"Sec. 3207. Mode of Serving a Notice, and Evidence of Service.—A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or, if he be not found at his usual place of abode, by delivering such copy AND GIVING INFORMATION OF ITS PURPOSE to his wife or any person found there, who is a member of his family, and above the age of sixteen years, or, if neither he nor his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode."

This statute was enacted in 1849, as will appear by reference to the code of Virginia, published in 1887.

The opinion of the Court of Appeals of Virginia in *Bowler vs. Huston*, *supra*, was handed down on April 25, 1878.

By this opinion in *Bowler vs. Huston*, *supra*, the Court of Appeals, which is the court of last resort of the

State of Virginia, seems to have nullified the statute referred to, in effect, in so far as it attempts to substitute constructive service of process for actual personal citation. But, assuming that the opinion referred to did not have this effect, can the statute in question be upheld in the case at bar?

Suppose the Code of Virginia provided that the mere filing of a declaration, duly verified, should be notice to a defendant, and that unless the defendant appeared within a given time, the plaintiff should have judgment—would jurisdiction, thus acquired, render a judgment valid, extraterritorially?

If want of jurisdiction is apparent on the face of the record, no presumptions will be indulged in its favor, and it will not be treated as possessing any force or validity whatever.

Bank *vs.* Butman, 29 Me., 19.

Tessier *vs.* Lockwood, 18 Neb., 167.

1 Black, Judgments, sec. 278.

If the record produced shows that the court did not have jurisdiction of the person of the defendant, it must be disregarded.

Freeman, Judgments, sec. 459.

Defects appearing on the face of a record may be taken advantage of upon its production under a plea of *nul tiel* record.

Harper *vs.* Cunningham, 5 Appeals, D. C., 203.

It is a good defense to the action on a judgment that the court which rendered it had no jurisdiction, either of the subject-matter of the action, or of the person of the defendant, and according to the majority of the

decisions, this may be shown even in contradiction of the record.

23 Cyc., 1512.

23 Cyc., 1578-1581.

12 Am. & Eng. Ency., Bldg. & Pr., 217-218.

11 Am. & Eng. Ency., Pldg. & Pr., 1159.

Karrick *vs.* Wetmore, 25 Appls. D. C., 415.

Wetmore *vs.* Karrick, 205 U. S., 141.

III.

The court below erred in giving judgment for the plaintiff, because the record fails to show that the defendant was a *resident* of the State of Virginia at the time of the institution of the suit wherein the judgment sued on was obtained.

The record discloses this remarkable situation: A citizen of one jurisdiction (Colorado) is sued in a court of another jurisdiction (District of Columbia) on a judgment rendered against him in a third jurisdiction (Virginia). Plainly, in these circumstances, it was incumbent upon the plaintiff to show, by affirmative proof, in the court below, that the service of the process of the court in which the judgment sued on was rendered, was made within the territorial jurisdiction of that court.

It is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears.

Railway Co. *vs.* Pinkney, 149 U. S., p. 209.

Kendall *vs.* U. S., 12 Pet., 524.

Harris *vs.* Hardeman, 14 How., 334.

A judgment sued on is invalid outside of the State in which it was rendered unless it affirmatively appear that when process is alleged to have been served the

defendant was a resident of the State where the judgment was obtained.

Barrow Steamship Co. vs. Kane, 170 U. S., 111.
St. Clair vs. Cox, *supra*.
Fitzgerald vs. Fitzgerald, 137 U. S., 98.
Life Ins. Co. vs. Sprattley, 172 U. S., 602.
Goldey vs. Morning News, 150 U. S., 519.

The return of service upon an officer of a foreign corporation is insufficient unless it appears from the return or from the record that the company is doing business in the State when the suit is begun.

Stock Exchange vs. Board of Trade, 125 Fed. Rep., 467.

To give a Circuit Court of the United States jurisdiction on the ground of diverse citizenship, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case.

Railway Co. vs. Pinkney, 149 U. S., 194.

Where the jurisdiction of the Circuit Court is founded only on the fact of diverse citizenship, the complaint must show that either the plaintiff or the defendant resides within the district in which the action is brought.

Laskey vs. Mining Co., 50 Fed. Rep., 634; same case, second hearing, 56 Fed. Rep., 628.

Residence of the parties must be stated in the summons, as where the jurisdiction of the court in transitory actions depends upon residence.

Burrows vs. Morton, 170 Mass., 569.
Beach vs. Baldwin, 9 Conn., 476.

Although a judgment in one State against a citizen of another State, may be held valid under local laws by the courts of the former, the courts of the latter are

not bound to sustain it, if it would be invalid but for the special laws of the State where rendered.

Sewing Machine Co. *vs.* Radcliffe, 137 U. S., 287.

The presumptions indulged in support of the judgments of superior courts of general jurisdiction are *limited to jurisdiction over persons within their territorial limits*, persons who can be reached by their process, and also proceedings which are in accordance with the course of the common law. The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits.

Galpin *vs.* Page, 18 Wall., 365.

Nowhere in the transcript of record or in the plaintiff's declaration does it appear that the defendant, William W. Degge, was a resident of the State of Virginia at the time of the institution of the Virginia suit, or at the time the judgment sued on was rendered; while it appears affirmatively from the pleas of this defendant, and the affidavit filed therewith, that he is a resident of the State of Colorado and has been for many years, and that he received no notice, information or intimation respecting said suit, until the spring of the year 1908, when he received a letter from a firm of attorneys of the city of Denver, Colorado, to whom the judgment had been sent, by the plaintiff, for collection.

IV.

The summons issued in the Virginia suit was in the words and figures following, to wit (Rec., p. 10):

"The Commonwealth of Virginia to the Sergeant of the City of Norfolk, Greeting:

We command you, that you summon W. W. Degge and Nellie A. Degge to appear at the Clerk's Office of our Court of Law and Chancery of the City of Norfolk, at the Rules to be holden

for the said court on the first Monday of Feb. 1897, to answer W. J. Baxter, Jr., trustee of a plea of debt for \$4,500.00.

Damages \$50.00.

And have then and there this writ.

Witness, L. Royster, clerk of our said court, at his office the 18th day of January, 1897, in the 121st year of our foundation.

Teste:

L. ROYSTER, C. C."

The plaintiff's declaration in the Virginia suit, filed on the first Monday in March, 1897, nearly two months after the issuance of the summons, was as follows (Rec., pp. 10-11):

"In the Court of Law and Chancery of the City of Norfolk. Norfolk City, to wit:

W. J. Baxter, Jr., trustee for Francis Hatton, E. Vance, C. W. Fentress, W. H. H. Trice, and Edward Spalding (the plaintiff in this suit), complains of W. W. Degge and Nellie A. Degge (the defendants in this suit), who have been summoned to answer the said plaintiff of a plea that they render to the said plaintiff the sum of forty-five hundred dollars which they owe to, and unjustly detain from, the said plaintiff.

And thereupon the said plaintiff says that heretofore to wit on the 31st day of December, 1896, the said defendants made their certain note in writing bearing date the year last aforesaid, and subscribed their name thereto, by which said note they, the said defendants, then promised to pay on demand after date thereof to the order of themselves forty-five hundred dollars at the Norfolk National Bank, Norfolk, Va., for value received and therein waived the benefit of the Homestead Exemption as to this debt.

And the said W. W. Degge and Nellie A. Degge after the making of the said note and before the same became due and payable, to wit, on the day and year last aforesaid, by writing their name on the back thereof endorsed the said note to the said plaintiff.

And the said plaintiff avers that although the said sum of \$4,500.00 has according to the tenor and effect of the said note been long since due and payable, and although the said defendant have been often requested to pay the same to the plaintiff, yet the said defendants have not paid to the said plaintiff the said sum of money above mentioned, or any part thereof, but have hitherto wholly neglected and refused so to do, to the damage of the said plaintiff \$50.00 and therefore he brings suit.

SPALDING, *P. Q.*"

It is respectfully submitted that there was a fatal variance between this declaration and the summons. The summons shows a proceeding by the plaintiff in his *individual capacity*, while the declaration was filed by the plaintiff in a *representative capacity*, as trustee for certain parties named, for the first time, in the declaration, and it will be seen that the judgment was entered in favor of the plaintiff, in this representative capacity, without any notice to the defendant of this change in the character of the suit.

A suit by W. J. Baxter, Jr., trustee, is a suit by W. J. Baxter, Jr., and in either form will sustain only such action as he can maintain in his own name. W. J. Baxter, Jr., and W. J. Baxter, Jr., trustee, without more, are one and the same name. The word "trustee" appearing in the summons, after the plaintiff's name, without a statement *for whom, or of what* he is trustee, is merely *descriptio personæ*, and the Virginia suit must, therefore, be held to have been commenced by the plaintiff in his individual capacity only.

15 Am. & Eng. Ency. Pldg. & Pr., 480, note 1.
Anderson's Dictionary of Law, 349.

"The ordinary rule undoubtedly is that if a person merely adds to the signature of his name

the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personae*."

Metcalf *vs.* Williams, 104 U. S., 93.

Where one sues or is sued in a representative capacity, it must be averred that it is as such representative and a mere statement of the representative character, following the name of the party, will be treated as only *descriptio personae*.

31 Cyc., 99.

Buckley *vs.* Wilson, 56 Ala., 393.

Porter *vs.* Nekervis, 4 Rand (Va.), 359.

Bingham *vs.* Stewart, 13 Minn., 106.

Pratt *vs.* Beaupre, 13 Minn., 187.

Curran *vs.* Kendall Co., 8 New Mex., 417.

Plumtree *vs.* Dratt, 41 Barb., 333.

Turing *vs.* Jones, 5 T. R., 402.

Judgments conclude parties only in the capacity in which they sue or are sued, and a party should be so described in the process as to show in what character he sued or is sued.

20 Ency. Pldg. & Pr., 1134-1135.

A judgment against "D., treasurer," is a personal judgment, the word "treasurer" being merely *descriptio personae*.

Dougherty *vs.* McManus, 36 Iowa, 657.

The plaintiff has no right to change the form and character of the action after it is commenced, and when the summons described the plaintiff as "administrator" and in the complaint he declared generally without any representative description, it was held that the variance was fatal.

Blanchard *vs.* Strait, 8 How. Pr., 83.

It is well settled that the declaration or other pleading filed by the plaintiff should correspond with the process issued, both as to cause and form of action and as to parties.

The character or capacity in which a party sues or is sued must be the same in the writ as in the pleading.

Chapman vs. Spence, 22 Ala., 588.

Pierce vs. Lacy, 23 Miss., 193.

Goodman vs. Walker, 30 Ala., 482.

Canning vs. Davis, 4 Burrows Rep., 2417.

Douglas vs. Irlan, 8 Durnsford & East's Rep., p. 227.

Halley vs. Tipping, 3 Wilson Rep., 61.

Where a plaintiff in the summons describes himself as "administrator," etc., and in the complaint declares generally without any description, it is a fatal variance, and the proceedings will be set aside as irregular. A plaintiff has no right to change the form and character of the action after it is commenced.

Blanchard vs. Strait, 8 How. Pr. (N. Y.), 83.

A writ in the name of "Reuben Chapman, Governor, etc.," is his individual suit, and will not support a declaration in the name of "Reuben Chapman, Governor of the State of Alabama." Where there is a total departure from the writ, it is not necessary to plead it in abatement, but the declaration may be stricken from the files on motion.

Chapman vs. Spence, 22 Ala., 588.

The writ being sued out in the names of A. and B., as partners under the firm name of A. and B., and the declaration being filed in the names of A. and B., without describing them as partners; held that there was a fatal variance between the writ and declaration which

might be taken advantage of either by demurrer or plea in abatement.

Pierce vs. Lacy, 23 Miss., 193.

A writ must show for whose benefit the suit is brought.

Hammond vs. Ry. Co., 76 Atl. Rep., 672.

The declaration, it is submitted, was, in effect, an amendment, after the return day, without notice to the defendant.

Where a judgment by default was rendered on a substituted petition, the substitution having been made without notice to the defendant or any one authorized to represent him, the judgment was held to be erroneous.

Watson vs. Miller, 69 Tex., 175.

If a new cause of action is set up by amendment, new process must issue, and when service is had by publication and there is no appearance of defendant, an amendment will not be allowed.

32 Cyc, 424-425.

Where a suit is brought by the husband in his name as such, and afterwards amended so as to stand as the suit of himself as administrator, for the use of his children, it is an abandonment of the original suit as husband and operates as a discontinuance thereof, and unless the declaration be amended so as to conform to the changed condition of the suit, the action, as amended, can not be maintained.

Hagerty vs. Hughes, 63 Tenn., 222.

A judgment not supported by the pleadings is as fatally defective as one not sustained by the verdict or finding.

Black, Judgments, sec. 183.

When a complaint states one cause of action and in that suit service on or appearance of the defendant is made, a subsequent judgment therein rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State, and it has no better standing in the courts of another State.

Reynolds vs. Stockton, 140 U. S., 254.

A default binds the defendant only in the character in which he is sued.

Unfried vs. Heberer, 63 Ind., at p. 72, cited with approval in *Reynolds vs. Stockton*, *supra*.

Where the declaration or complaint is amended in matters of substance, or withdrawn, and a new one filed in its place, the amended or substituted pleading must be served on the defendant, or he must be otherwise notified of it, before he can be defaulted.

23 Cyc., 742, and cases cited.

In *Karrick vs. Wetmore*, 25 Appeals D. C., 415, Mr. Justice Morris, delivering the opinion of the court, used this language:

"The right to be heard is a fundamental right of every litigant under our system of jurisprudence and under every system of jurisprudence worthy of the name, and usually it is not denied even in the lawless codes of the most lawless savages, and in the right to be heard the first element is that of notice. The service of process, in other words, notice, is the essential prerequisite to the exercise of jurisdiction by any court. Indeed, it may be said that, strictly speaking, not a single step from the beginning to the end of a legal controversy can be taken without notice to the opposing party."

Before default can be regularly taken against a party there must be positive and sufficient evidence in court of due service, and no substantial defect in that respect can be cured by subsequent knowledge of the facts.

Johnson vs. Delbridge, 35 Mich., 436.

The defendant, by his failure to appear, waived nothing.

Gilbert vs. Hanford, 13 Mich., 40.

The defendant makes no admission by suffering default. His silence should not be made to help the plaintiff out. If the plaintiff has not stated a case sufficient to justify the intervention of the law in his behalf, he is not entitled to any judgment, whether the defendant answers or not.

Doud vs. Milling Co., 55 Minn., 53.

Acceptance of service is no waiver of defects in a summons.

Falkner vs. Guild, 10 Wis., 506.

V.

The Virginia court did not acquire jurisdiction of the defendant for the reason that the summons, a copy of which is alleged to have been left with Nellie A. Degge, was fatally defective, null and void. That there should exist in a single summons as many irregularities and defects as will be found at a glance in this is almost unbelievable.

In the first place, the defendant's full christian name was not given in the summons. The failure to give the defendant's christian name, it is submitted, rendered the summons void, and it was not incumbent upon the defendant to appear and answer, the summons not having been personally served.

It is well settled that it must be stated with certainty who are the parties to the suit and actions, to be properly brought, must be commenced and prosecuted in the proper christian and surnames of the parties.

1 Chit. Pldg., 256.

Stephens on Pleading, 284.

Perry on Pleading, 339, 340.

At common law a pleading describing parties by the initials only of their christian names was bad on demurrer.

14 Ency. Pldg. & Pr., 273.

In *Monroe Cattle Co. vs. Becker*, 147 U. S., 47, it was said:

“Defendant was impleaded by the name of ‘A. W. Becker.’ Initials are no legal part of a name, the authorities holding the full christian name to be essential. . . . This loose method of pleading is not one to be commended, but as no advantage was taken of it in the court below, it will not be considered here.”

Initials are no legal part of a name; the christian name must be used.

Norris vs. Graves, 4 Strogh. L. S. Car., 32.

Initials are not a name, and can not be used for the christian names of parties to actions.

Elberson vs. Richards, 42 N. J. L., 69.

Seeley vs. Schenck, 2 N. J. L., 71.

Kellam vs. Toms, 38 Wis., 592.

In *Manufacturing Company vs. Leon*, 42 N. J. L., 540, the suit was in the name of J. M. Leon against the Dittmar Powder Manufacturing Company. Held, that the omission to give the full name of the plaintiff was fatal.

In *Miller vs. Hay*, 3 Exch., 14, the defendant was

described as "W. D. Hay." : Held, insufficient designation of the defendant and bad on the face of the narr.

The parties should be described in the process by their full christian names and surnames.

20 Ency. Pldg. & Pr., 1131.

The omission of the christian name of the defendant in a summons with no amendment at any stage of the proceedings is a radical and fatal defect.

Hauser vs. Jones, 1 Phila. (Pa.), 394.

Enewald vs. Olsen, 39 Neb., 59.

In *Herbage vs. McKee*, 82 Neb., 354, it was conceded by counsel that a foreclosure decree was **void** as to defendants served by publication and described by the initial letters of their names.

In *Skelton vs. Sackett*, 91 Mo., 377, it was held that an order of publication which named the defendant as Q. R. Noland did not give the court jurisdiction in a tax suit against Quinces R. Noland for delinquent taxes on land granted by letters patent to Quinces R. Noland, where there was no appearance under such publication.

No valid judgment can be entered in a proceeding to enforce unpaid taxes against one whose christian name is Michael, upon a constructive service of process against him by the name of Mike, where there is nothing to show that he ever answered to or tolerated such name.

Ohlman vs. Saw Mill Co., 222 Mo., 62.

Statutes creating a method for bringing a defendant into court without personal service are strictly construed where actual notice may never reach him.

Stull vs. Massalonka, 74 Neb., 322.

One reason for insisting strongly upon correctness in the names of parties is that, otherwise, there would be

considerable difficulty in establishing a plea of former recovery.

Morgan *vs.* Woods, 33 Ind., 23.

If a defendant is improperly named and the process is constructively served by leaving a copy, *he is not bound to appear and plead the misnomer.*

20 Ency. Pldg. & Pr., 1133.

Journey *vs.* Dickerson, 21 Iowa, 308.

Skelton *vs.* Sackett, 91 Mo., 377.

Fitzgerald *vs.* Salentine, 10 Metc. (Mass.), 436.

Slossan *vs.* Brown, 20 Pick. (Mass.), 436.

Ex parte Cheatham, 6 Ark., 531.

In Journey *vs.* Dickerson, *supra*, the court said:

“This mode of service is statutory. It is allowed in most of the States. But for the statute, actual notice of the process should always be given to the defendant. For the interests to be affected by litigation are regarded so important that it is not to be left to mere *presumption or inference that the party had knowledge of the proceeding, but it should be positively and affirmatively established before further proceedings should be permitted.* The statute, however, allows this substituted service, regarding the presumption or inference fair and legitimate, that a copy thus left will come to the actual knowledge of the party sought to be charged. And yet this certainly is not actual service, for actual service means personal, either by reading to defendant or delivering to him a copy of the process. When left at the residence, or the substituted mode is adopted for actual or personal service, there is no more than a *legal presumption that notice thereof does actually come to the defendant.* And it would seem to be both fair and reasonable to hold that, if a plaintiff *depends upon this method for bringing a party into court, he should, at his peril, see to it that every substantial requirement of the law has been complied with.* In

the case of actual service, there is certainly much reason in the doctrine that if the defendant is misnamed he should nevertheless appear and plead the same in abatement, or in some manner raise the objection, and that if he fails to do so, he shall not afterwards be heard to question the regularity of the judgment. For when thus served he is advised by the writ, the law and its officers, that he is the man against whom the judgment is asked, and he, at his own peril, fails to give heed to the command. And when it is said in the elementary books that misnomer is only pleadable in abatement, it can only mean cases of personal service. . . . The doctrine that a party could only thus take advantage of a misnomer would not apply in its reason to any other method of service."

In *Skelton et al. vs. Sackett*, 91 Mo., 377, it was said:

"We are of the opinion that the above points are well taken. While it has been held by this court that the middle name of a person is no part of his name, this rule has never been extended to the christian name, but, on the contrary, the law presumes that every person has a christian name as well as a surname, and in the case of *Martin vs. Barron*, 37 Mo., 301, where the main point relied upon by the defense was, that defendant being described in the writ by the initial of his christian name, and the officers return of service being in the same defective manner, that there was nothing to show on the record that he was ever served with process, or that the court acquired jurisdiction over him, and that the proceeding and judgment are void, it is said: "The christian and surname of both plaintiff and defendant should be set forth with accuracy; for, since names are the only marks and *indicia* which human kind can understand each other by, if the name be omitted or mistaken, there is a complaint against nobody. But, when the service has been read by a wrong name, the misnomer or want of a name is pleadable in abatement only." It is very clear from the above case, that when a

party is sued by a wrong name, and service of the writ is *actually made on the person intended*, and he does not appear and plead in abatement, that the judgment rendered in such case is not void. But a distinction exists between such a case and a case where the suit is against a non-resident, where the only notice is by publication of notice and no appearance is made. In the former case where there is a mistake in the name, and the writ is served on the right party, he is thereby informed that he is the person meant; and to take advantage of the misnomer, he must appear and plead the misnomer in abatement. In the latter case, where a wrong name is used in an order of publication, the party really intended receives no such notice that he is the party intended as one who is personally served with a writ, which service designates him as the person meant to be sued. While the service of the writ in the former case is a demonstration that the person upon whom it is served is the person intended to be sued, in the latter case notice by publication is a proceeding against the name, and to give such notice as the service of a writ imparts it should be correctly set forth, and if it is not so set forth, it is ineffectual as a notice. It would seem that an order of publication of notice against J. Smith would impart the same notice to James, Joseph, John, Jonathan or Jackson Smith, but it would not impart to any one of them notice of the fact that he was the J. Smith intended by the notice, while the service of a writ upon any one of them would inform him that he was the Smith intended."

In the next place, the christian name of the plaintiff is not given in the summons. This omission, it is submitted, is also fatal.

As will be seen from the authorities hereinbefore cited, the rule as to the designation of parties in the summons, by their full names, applies to both plaintiffs and defendants.

And see 20 Ency. Pldg. & Pr., 1128.

VI.

The summons under consideration was void, in the next place, because the seal of the court was not affixed to it, to impart to the writ the appearance of validity, and the judgment based thereon, it is submitted, is a nullity.

Seals have been used by courts as a mark of authenticity from time immemorial.

In the Civil Law, seals were the evidence of truth.

Institutes, 2, 10, 2-3.

At common law it was necessary that the seal of the court be affixed to the summons.

"The original writ issued from the Chancery, and was under the Great Seal of the Kingdom. All subsequent process, whether original, mesne, or final, was judicial process, and issued out of the court of common law, into which the original writ was made returnable, under the private seal of that court; it bore teste in the name of the chief justice of that court."

Perry on Pleading, 148.

Stephens, Pldg., 55.

A warrant issued by a justice of the peace should be under the hand and seal of the justice.

4 Black Comm., 290.

The presumption is that every court has a seal, but it is not necessary for this court to presume that the Virginia court which rendered the judgment sued on herein was the possessor of a seal, for a seal is provided for, in terms, by the Virginia Code (sec. 3109), and the Transcript of Record herein shows that said court has a seal, the Transcript itself being under seal.

In *Insurance Company vs. Hallock*, 6 Wall., 556, the Supreme Court of the United States held that an "order

for the sale of property," without the seal of the court was null and void.

The Supreme Court of the United States has also held that a writ of error is void for want of a seal, though the clerk returns the transcript in obedience to the writ; apparently in the absence of any statutory requirement as to the placing of the seal of the court upon such writ.

Overton vs. Check, 22 How., 46.

A bill of exceptions must be under the seal of the judge.

Pomeroy's Lessee vs. Bank of Ind., 1 Wall., 592.

A summons having no seal is void, and service thereof will not confer jurisdiction.

Kelso vs. Norton, 74 Kans., at page 446.

A judgment by default in the county court will be held fatally defective by the appellate court on writ of error where the citation by virtue of which it was rendered did not have the seal of the county court impressed thereon.

Carson Bros. vs. McCord-Collins Co., 37 Texas Civ. Appeals, 540.

In *Lessee vs. King*, 6 Ohio, 11, it was said:

"The process of a court having a seal can only be evidenced by its seal, which is the appointed mode of showing its authenticity."

In *Finley vs. Smith*, 4 Dev. L. (N. C.), 95, it was said:

"The common law requires that a seal of a court of record shall be affixed to all its writs. . . . The seal of a court is as indispensable to its writs as the seal of a party is indispensable to his bond."

In *Governor vs. McRea*, 3 Hawks (N. C.), 226, it was said:

"A process by which a man's person or property is liable to be affected ought to bear on its

face the highest evidence of authenticity, and the law has always considered that the writs issuing from a court are most satisfactorily proved by the seal provided by public authority, which every man is presumed to know."

In *Bailey vs. Smith*, 12 Maine, 196, it was declared:

"The process of each court is by law to be under its own seal, and the impression is not here a matter of form. A seal has been adopted by this court with appropriate devices. It gives additional solemnity to the papers to which it is affixed and renders it more difficult to forge or counterfeit them. We regard the seal as matter of substance and, the process being an original writ, not amendable."

In the case of *Foss vs. Isett*, 4 G. Green Rep. (Iowa), 76, the court said:

"On the first appearance of the defendant he moved to quash the proceedings in attachment for the reason, among others, that the paper purporting to be a writ was not under seal. Thereupon, the plaintiff moved the court to amend, which was granted, and the motion of the defendant overruled. This was error. Before the property of the defendant could be seized, it was indispensable that the plaintiff should obtain a writ. A paper issued by the clerk in the form of a writ is no writ, unless it has impressed upon it the seal of the court from whence it issues. Without this seal of the court it is no more for the purpose of a writ than blank paper. Could it be amended? Not at all, for there is nothing to amend. It lacks the essential ingredient of a writ, and is not amendable. It is the seal—other things being right—which makes it a writ, gives it force, efficacy and life."

In *Garland vs. Britton*, 12 Ill., 232, it was said:

"If a court has a judicial seal, it must be affixed to all of its process; if it has not, the clerk must

use his private seal, but he ought in such case to certify that no public seal has been provided, for **the presumption is that every court has a seal.** The writ in this case did not purport to be under the seal of the court, nor the private seal of the clerk. It was, therefore, without vitality, and the service of the same was without effect. The defendant not being before the court, the decree was unauthorized, and must be reversed."

At common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued.

Williams vs. Vanmeter, 19 Ill., 293.

State vs. Flemming, 66 Me., 142.

Wheaton vs. Thompson, 20 Minn., 196.

Reeder vs. Murray, 3 Ark., 450.

Woolford vs. Dugan, 2 Ark., 131.

A summons issued by a justice of the peace is defective when without a seal.

Veal vs. Brown, 2 N. J. L., 68.

VII.

In the next place, the summons was defective, in that it did not state, with sufficient certainty, the place at which the defendant was required to appear.

It will be observed that the summons commanded the defendants "to appear at the clerk's office of our Court of Law and Chancery of the city of Norfolk, at the Rules to be holden for the said court, on the first Monday in Feb., 1897," etc. This, it is submitted, was not a sufficient statement of the place of appearance under the authorities.

In *Anonymous*, 6 N. J. L., 203, the summons directed

the defendant "to appear before the justices of the Supreme Court," without saying "at Trenton," or giving any place, and the court held that the summons was not amendable.

See, also—

Wormsley *vs.* Cummins, 1 Ark., 125.

Crenshaw *vs.* Hempel, 130 S. W., 731 (Tex.).

The "Court of Law and Chancery of the city of Norfolk" is simply the *name* of a circuit court of the State of Virginia, the jurisdiction of which includes the counties of Nansemond, Southampton, Isle of Wight, and the city of Norfolk.

Was the defendant required to *assume* that the clerk's office of said court was somewhere within the boundaries of the city of Norfolk, rather than at some other place within the circuit?

VIII.

Again, the summons was defective in that the *time* at which the defendant was commanded to appear to answer the plaintiff's plea, was not stated with sufficient clearness. The command of the summons, it will be seen, was to appear "on the first Monday in *Feb.*, 1897," to answer, etc. Was this sufficient? In view of the great strictness with which process is construed in cases of substituted service, the *abbreviation* in the summons ought not to be sustained. It is respectfully submitted that the month in which the defendant was required to answer should have been stated without abbreviation.

Moreover, "Feb." seems to be an incorrect abbreviation of the word "February."

It has been held that "Feby." is a good abbreviation of the word "February" (Cutting *vs.* Conklin, 28 Ill., 506), but, it is believed, no adjudicated case can be found

holding that "Feb." is a proper abbreviation for "February."

See, also, *State vs. Jericho*, 40 Vt., 121.

IX.

The summons was further defective, in that it did not show the docket number of the case, and did not give the name of the plaintiff's attorney.

The summons should afford a defendant generally the same information as the declaration; it should, in fact, contain the substance of the declaration.

Grant vs. Durgin, 451 N. H., 167.

McDonald vs. Walsh, 5 Abb. Pr., 68.

McNeff vs. Short, 14 How. Pr., 463.

Ordinarily, where a summons is served, unaccompanied by a copy of the declaration or complaint, the defendant is commanded to appear and answer the plaintiff's declaration or complaint, *filed or to be filed*; in other words, it is customary for the summons to show that a declaration *has been*, or *will be*, filed.

It will be seen that there is no mention in the summons under consideration of any declaration or complaint having been filed or *to be filed*, and that no declaration *was* filed until *after* the return day. So that, if the defendant had appeared in response to the so-called summons, he would have found no declaration or complaint to answer.

At common law the plaintiff could not take a judgment by default unless his declaration was filed **before the return day**.

6 Ency. Pldg. & Pr., 50.

Is it possible that a judgment based upon constructive service of a summons, in which so many irregularities and defects appear, can be sustained?

X.

It is respectfully submitted that the return of service in the Virginia court was defective and insufficient, in that it did not show that the officer used *due diligence* to find the defendant, W. W. Degge. The record shows that he made but one attempt to find this defendant.

The return reads:

"Executed this the 18th day of January, A. D. 1897, by serving a copy *hereon* on Nellie A. Degge. Not finding W. W. Degge at his usual place of abode this the 18th day of January, 1897, I served a copy hereof on Nellie A. Degge, his wife, she being there and a member of his family over the age of sixteen years, and gave information of its purport to her."

If the officer did not find the defendant on "this the 18th day of January, A. D. 1897," he should have tried again before making his return. Instead of trying again, he seems to have hurried back to the clerk's office and made his return. If the officer had left out of his return the "this the 18th day of January," and had waited and made his return on the return day, the return might possibly have been all right. But in the present form of the return it can not be held that due diligence was used to find the defendant.

See 18 Am. & Eng. Ency. Pldg. & Pr., 945-946.

Where there has been service by leaving a copy, the return must affirmatively show that the officer *could not find the defendant*.

Settlemier *vs.* Sullivan, 97 U. S., 444.

Grant *vs.* Harlow, 11 Iowa, 429.

Matteson *vs.* Smith, 37 Wis., 333.

Hammond *vs.* Olive, 44 Miss., 543.

Cooper *vs.* Roberts, 16 N. J. L., 353.

The return does not show that the defendant *could not be found*, but shows merely that he could not be found **"this the 18th day of January."**

Personal service ought always to be effected when possible, and the statutory substitute by leaving a copy at the defendant's place of abode is authorized only where it is impossible to obtain personal service.

19 Ency. Pdg. & Pr., 622.

Castleton *vs.* Weybridge, 46 Vermont, 474.

Knox *vs.* Miller, 18 Wis., 397.

Northrup *vs.* Shepherd, 23 Wis., 513.

LeGrand *vs.* Fairall, 86 Iowa, 211.

The judgment is void, if defendant was a resident, and by due diligence service could have been made on him personally.

Hockaday *vs.* Jones, 56 Pacif. Rep., 1054.

In Hammond *vs.* Olive, 44 Miss., at page 547, it was said:

"This return is defective because the officer does not *negative his ability to make personal service*. The words 'he being absent,' in their connection with the context, import that the defendant was not 'at home'—was absent from 'his place of abode.' This may be true, but it does not follow that because of such absence 'he could not be found;' he might have been at his nearest neighbor's, or at the county town, and it might have been entirely feasible for the sheriff to have 'found him.' The words 'he being absent' are not the equivalent of 'could not be found.' The officer is guilty of a palpable violation of duty under the law to substitute the secondary service by copy at the 'abode,' if he could, with the use of diligence, make personal service. Nor do we doubt his liability to an action for damages if it was in his power to make a personal service, and he failed to do so, and thereby injury resulted to the plaintiff."

In *Weaver vs. Springer*, 2 Miles (Pa.), 42-44, the court used the following language:

"There are sound reasons why the mode of executing a writ of summons should be distinctly stated. In default of an appearance the court may be called upon by the plaintiff to allow a judgment against the defendant, and before thus visiting a party with the penalty of a default, common and equal justice demand that it should be *unequivocally exhibited to the court by the record* that the writ was served on a proper day and in a legal manner, while strict attention to the form of the return will do much to prevent remissness or negligence on the part of the officer charged with the important duty of executing the writ."

It will be observed that the return in question *does not show service of a copy of the summons at the "usual place of abode" of the defendant, W. W. Degge*. It merely recites that the officer *failed to find him there* (where?) "this the 18th day of January, 1897." This can not be aided by presumption, it is submitted.

The court will also observe that the return does not show service upon the "wife" or a "member of the family" of the defendant "above the age of sixteen years." There is nothing anywhere in the record hinting that Nellie A. Degge is the wife of W. W. Degge. *Non constat* but that she may have been a stranger, or an infant daughter of tender years.

A return of service upon S. B. Bancroft, in a case against Samuel B. Bancroft, is insufficient.

Bancroft vs. Spier, 24 Ill., 228.

A return of service on S. H. Butterfield against Sylvanus H. Butterfield, is insufficient.

Butterfield vs. Johnson, 46 Ill., 68.

The fact that defendant may have had actual knowledge of the suit will not validate the judgment.

Osborne *vs.* Corp., 9 Wash., 666.

Jurisdiction does not attach until defendant is in court, or until due legal means be taken to bring him in.

DeMoss *vs.* Camp, 5 How. (Miss.), 516.

6 Am. & Eng. Pldg. & Pr., 25-27.

There must be due proof of service at the time the default was entered. Proof must be made then or not at all.

6 Am. & Eng. Pldg. & Pr., 29.

Substituted service is a departure from the common law, and the return must affirmatively show compliance with all the essential requirements of the statute. The return must be strictly construed and presumptions in aid of such returns can not be indulged.

Trust Co. *vs.* Springs, etc., 139 U. S., 137.

Settlemier *vs.* Sullivan, 97 U. S., 444.

Kibbe *vs.* Benson, 17 Wall., 624.

King *vs.* Davis, 137 Fed., 198.

It is well settled that the return of process before the return day is premature.

Dillian *vs.* Rash, 27 Mo., 243.

Austin *vs.* Goodale, 58 Me., 109.

Chalmers *vs.* Moore, 22 Ill., 359.

A return before the return day is in law *no return*.

Caskey *vs.* Nitcher, 8 Ala., 622.

The theory of this rule of law can only be that if a return be made before the return day, it suggests that the officer in the case of service by leaving a copy has not used the proper degree of diligence to find the party

for whom the writ was intended; that if he had waited until the return day, he might have found the defendant during the life of the writ.

The return is further defective and insufficient, in that it does not show service in the State of Virginia. In a case of substituted service such an omission can not be supplied by presumption.

The residence of the parties must be stated in the summons.

Burrows vs. Morton, 170 Mass., 561.

Beach vs. Baldwin, 9 Conn., 476.

It nowhere appears in the record that the defendant William W. Degge, was a resident of the State of Virginia at the time of the institution of the suit in which the judgment sued on was obtained, as hereinbefore pointed out.

XI.

Section 3241 of the Virginia Code provides as follows:

“When Clerk to Dismiss Suit.—If one month elapse after the process is *returned executed* as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared.”

Upon the failure of the plaintiff to file his declaration within one month after the return of the summons in the Virginia suit, it became the ministerial duty of the clerk of the court to forthwith enter said suit dismissed, yet the clerk, disregarding his duty in the premises, did not enter the suit dismissed, as required by the statute, but, on his own motion, and without any action or order of the court, as far as the record discloses, undertook to continue the case until the first Monday in March, 1897, to enable the plaintiff to file his declaration.

It is respectfully submitted that the clerk's failure to comply with the express provisions of this statute, rendered the judgment null and void.

Buchanan *vs.* King's Heirs, 22 Gratt. (Va.), 414.

Kinsey *vs.* Ford, 38 Barb. (N. Y.), 195.

III Va. 199. 76 S.E. 298.
XII.

Section 3209 of the Virginia Code provides:

"Ten Days' Notice Generally Required on Motion for Judgment.—In any case wherein there could be a judgment or decree for money on motion, such motion shall be after ten days' notice, unless some other time be specified in the section of the statute giving such motion."

The defendant, it is submitted, was entitled to notice of the plaintiff's motion for judgment, under this statute. It does not appear from the record that he was given notice of the plaintiff's motion or even that an attempt was made to notify him.

XIII.

Under sections 3285 and 3286 of the Virginia Code, an inquiry of damages seems to have been necessary before the judgment was entered.

Judgment can not be confirmed without an inquiry of damages.

Hatcher *vs.* Lewis, 4 Randolph (Va.), 152.

XIV.

An examination of the record discloses that the declaration filed in the Virginia suit was unverified; that it was not alleged in the declaration that the note sued on was *delivered* to the plaintiff or that the plaintiff was the *owner* and *holder* of the note, and that the note was not *produced* in court before the judgment was entered.

The judgment for these reasons was unauthorized.

A declaration which does not allege the delivery of a note in a suit on a promissory note, nor that the plaintiff in the suit is the owner and holder of the note, **will not authorize a judgment by default.**

In *Moody vs. Bengé & Jewell*, 28 Texas, at page 547, it was said:

"Upon inspection of the record we find an error patent upon the face of the petition for which the judgment must be reversed. Waiving the question as to whether the allegations of the petition, taken together, are tantamount to an averment of the execution of the note sued on by Moody, the plaintiff in error, of which we think there may be some doubt, there is *no averment of a delivery of the note to the defendants in error, nor that they are the owners and holders of the note.* The petition alleges that Moody 'gave' his promissory note, but to whom he gave it is not alleged. It is true, we may infer from the statements of the petition that he gave it to Bengé & Jewell, and that they are the owners of it, but in doing so we would be dispensing with a well-established rule of pleading, which requires that *the facts constituting the right of a party to recover, and fixing the liability of his adversary, shall be averred directly and distinctly in his pleading, and not left to be supplied by inference.* An averment that the note was delivered to the plaintiff, or to some other person through whom he claims, is as necessary to entitle the plaintiff to recover as is the averment of its execution by the maker, otherwise there is no privity of contract established between the parties, no liability fixed on the maker, and no right shown in the plaintiff. *Jennings vs. Moss*, 4 Tex., 452. The cases of *Lipscomb vs. Bryan*, and *Malone vs. Craig*, 22 Tex., 610, are precisely in point, and decisive of this."

The promissory note sued on should have been produced before the judgment of the Virginia court was rendered.

14 Am. & Eng. Ency. Pldg. & Pr., 695.

Wilkins *vs.* McQuire, 2 Appls. D. C., p. 453.

XV.

It is respectfully submitted, in conclusion, that the court below erred in sustaining the plaintiff's demurrer to the defendant's fifth plea.

In *Parker vs. Bowman*, 104 S. W. (Ark.), it was held that:

"Where a judgment recovered in another State is sued on in this State, and subsequently suit is commenced in such other State to set aside the judgment sued on, judgment in this State may be prevented until the determination of that suit by pleading the same."

Why should the court below have permitted this suit to proceed to judgment before the determination of the equity suit pending in Virginia, which may result in the vacating and setting aside of the judgment which forms the basis of this action?

Upon the whole, it is respectfully submitted that the judgment appealed from should be reversed.

A. LEFTWICH SINCLAIR,

Attorney for Appellant.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1913.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

No. 2542.

OCT-8--1913

Henry W. Hodges
Plaintiff

WILLIAM W. DEGGE, APPELLANT,

vs.

**WILLIAM J. BAXTER, JR., TRUSTEE FOR FRANCIS
HATTON ET AL., APPELLEE.**

BRIEF FOR APPELLEE.

**JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,**
Plaintiff's and Appellee's Counsel.

Court of Appeals, District of Columbia.

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Statement of the Case.

But little need be added in the way of comment upon the statement of the case contained in appellant's brief. The court, however, should be warned of the fact that the appellant's statement quotes largely from the special pleas filed by him in the court below to the plaintiff's declaration, which was based upon a judgment. No evidence whatever was taken under any of these special pleas, although at various points in appellant's brief he appears to consider those matters as proven which were alleged merely in the pleas. This will develop later in the argument.

Upon the trial the only evidence offered was a transcript of the record of the proceedings upon which suit was brought. It is significant to note, as evidencing the good faith of these proceedings, that, as appears on page 14 of the record, it was stipulated between the parties that if judgment were entered in favor of the plaintiff it should be for \$2,111.69. with interest, etc., instead of for the amount of the note upon which judgment was originally given in the State of Virginia, which was \$4,500, thus showing that part payments or other credits had been made upon the original demand and that the amount really at issue in this cause was thoroughly well understood as between the plaintiff and defendant.

ARGUMENT.

Upon the trial the defendant objected to the introduction in evidence of the record sued upon, such objections being set out fully upon pages 13 and 14 of the record and pages 5 and 6 of appellant's brief. It is noteworthy that in the assignment of errors none of these objections are specifically relied upon, but there are general assignments of error in admitting a transcript of the record in evidence over the objection of the defendant, and in other proceedings consequent thereon. We submit that the appellant should in the assignments of error set out specifically and in detail the objections upon which he relies and not leave the court to search the record to discover them.

Without, however, discussing this objection, but without waiving it, we will proceed to consider the several items of objection apparently relied upon in appellant's brief, merely premising in a broad way that, as to every one of them, however good they might have been if raised and considered directly by the trial court in Virginia, they can have no validity whatsoever when used as the basis for a collateral attack, as in this instance, wherein under a plea of *nul tici*

record it is sought to claim invalidity as attaching to the entire proceeding in the Virginia court. Proceeding then to consider in the light of what we have already said, briefly, but we hope sufficiently, the several detailed objections raised in the argument, although not directly raised in the assignment of errors, we find—

First. It is said that the judgment sued on is not properly attested or certified.

This point is apparently based upon a misconception in the first instance, it being stated (a) that the judgment sued on was, among other things, for a given amount of costs, "together with the costs of this suit," whereas the transcript of record discloses a judgment for the plaintiff for a certain amount "and his costs by him about his suit in this behalf expended." Evidently the appellant has confused two separate items. The suit is brought for the specified amount of costs and the expression, "together with the costs of this suit," manifestly refers to the costs of the action now pending before this court and has no reference whatsoever to the item of costs in the Virginia suit, which was specifically stated to be \$12.25.

(b) Again, it is argued that the statement of costs in the record (p. 12) is not covered by the clerk's certificate. It appears immediately below the name of the deputy clerk and above the certificate of the clerk himself and is, therefore, part of the material certified to by the clerk.

(c) It is next said that the judgment is attested by the deputy clerk, who signs after his name "D. Clerk," and that the deputy had no right to make such return in his own name.

This also it is difficult to treat seriously, inasmuch as (Record, p. 12) it appears that the clerk himself certified to everything preceding his signature and which all related to the judgment, and we by no means are required to rely upon the signature of the deputy clerk.

Second. It is next contended (p. 10 of appellant's brief) that the defendant was never personally served.

In this case the defendant was served in strict compliance with the statute of Virginia, which reads as follows:

"SEC. 3207. Mode of Serving a Notice, and Evidence of Service.—A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years, or, if neither he or his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode."

The return of the officer reads as follows:

"Executed this the 18th day of January, A. D. 1897, by serving a copy hereon on Nellie A. Degge. Not finding W. W. Degge at his usual place of abode this the 18th day of January, 1897, I served a copy hereof on Nellie A. Degge, his wife, she being there and a member of his family over the age of sixteen years, and gave information of its purport to her.

"JOHN F. LAWLER,
"By W. A. THOMPSON, Dep'y."

This is not a case, therefore, of publication against a non-resident, or even against a resident who is secreting himself, but the regular method of bringing into court a resident such as the defendant was, and entirely similar to the method employed in the District of Columbia.

Third. It is contended that the court below erred in giving judgment for the plaintiff because the record failed to show that the defendant was a resident of Virginia at the time the original suit was commenced.

Under this heading it is stated, as if there were the slightest proof of it in the record, that a citizen of Colorado is sued

in the District of Columbia under a judgment rendered against him in Virginia. We desire to submit that it would not be material if this were true, but it does not appear that the defendant is a resident of Colorado at present or that he was such a resident at the time the Virginia judgment was obtained, although a large part of the argument under this heading is based upon such a theory. To the contrary, he appears to have had a domicile in Virginia, his wife having been served at his usual place of abode. The defendant's pleas are invoked to show that for many years he had been a resident of Colorado and received no notice respecting the suit until the spring of 1908. The court will not overlook the fact, however, that these pleas are entirely unsupported by evidence, and had they been true assuredly the defendant would not have failed to prove them.

Fourth. Under this head it is argued very much at length that a fatal variance existed between the writ and the declaration, the writ reciting that the defendant is called upon to answer "W. J. Baxter, Jr., Trustee," whereas the declaration recites that it is on behalf of "W. J. Baxter, Jr., Trustee for Francis Hatton, E. Vance, C. W. Fentress, W. H. Tice, and Edward Spalding."

It is argued that there is a fatal variance in that the word "trustee" is purely a word of description and apparently may not be modified or enlarged by the addition of the several names. But if the word "trustee" is a word of description it is not otherwise if the names of the *cestuis que trustent* are added, or, on the other hand, if the word "trustee" denotes the capacity in which the suit is brought, it none the less denotes it because the persons for whose benefit it exists are made known.

In these views of the case it seems to us quite immaterial that authorities should be cited, as they are, in the appellant's brief to show that where the word "administrator"

follows a man's name in the writ and is dropped entirely in the declaration, or *vice versa*, there is a fatal variance.

With all the industry of the appellant's attorney he has been unable to show to the court any case wherein it has ever been held that the specification of the beneficiaries in the declaration when they had not been specified in the writ would constitute a fatal variance or even an irregularity.

We do not discuss the cases decided in detail because they seem to us so far removed from the situation presenting itself to the court as not to require such examination. We will, however, refer but briefly to the case of *Chapman vs. Spence*, 22 Alabama, page 588, cited to prove that a writ in the name of Reuben Chapman, Governor, etc., will not support a declaration in the name of Reuben Chapman, Governor of the State of Alabama. We find, by reference to the case itself, that language used by the court was as follows:

"The writ being in the name of Reuben Chapman in his individual capacity, will not support a declaration in the name of 'the Governor of the State of Alabama.' "

In this case the corporate title of the Governor under which he could sue or be sued was "The Governor of the State of Alabama."

The enlargement of the title in the instant case, specifying at length the names of the persons for whom Baxter was trustee, was in its effect nothing more than any other enlargement of fact contained in the declaration and did not and could not take the defendant by any surprise. For instance: The defendant has not challenged the right of the plaintiff, after having stated in the writ that it was brought on a plea of debt for \$4,500, to show that this plea of debt consisted of a promissory note, payable at a certain place and containing a waiver of homestead exemption, and that it had been endorsed by two several defendants. Yet all these enlargements were of importance quite equal to the enlargement in the title.

†

Fifth. It is claimed that the summons was fatally defective, null and void, containing many irregularities.

In the first instance it is suggested that the summons is void because of failure to give the defendant's Christian name, and to support this authorities are cited which are said to tend to show that the parties must be described with certainty, that at common law a description by initials was bad on demurrer, that initials are no legal part of a name and are not a name, etc. The fact that almost or quite invariably the cases cited are cases where the question arose in direct proceedings and not collaterally is entirely ignored, and upon this point we shall cite 20 Enc. of Pleading and Practice, page 1131, wherein it is said:

"Strictly parties should be described in process by their full Christian names and surnames, but the use of initials to represent the Christian name is *at most* pleadable in abatement and is amendable." [Italics ours.]

Again it is said on the same page:

"If the defendant is not correctly named in the process it is generally held that this will not be material so long as the right party is served."

We add that in *Breedlove vs. Nichol*, 7 Peters (U. S.) 413, Chief Justice Marshall held that objections to the name of the plaintiff cannot be taken advantage of after judgment, and in *Fewlass vs. Abbott*, 28 Mich., 270, it was held that for the purpose of invalidating the judgment it would not be held that a plaintiff sued as O. B. Abbott had any other Christian name. Furthermore, it has frequently been held that an indictment or other pleading defective from the absence of a name is cured by verdict. *Smith vs. State*, 8 Ohio, 294; *State vs. Webster*, 30 Ark., 166; *State vs. Johnson*, 93 Mo., 317; *State vs. McMullan*, 68 N. C., 440; *Commonwealth vs. Melling*, 14 Gray (Mass.), 388.

We do not feel that this point is of sufficient importance to justify fuller discussion.

Under this heading it is further urged that the Christian name of the plaintiff was not given in the summons (Brief, p. 27).

The observations already made under this section apply equally well to this suggestion.

Sixth. The summons is objected to as void because the seal of the court was not affixed to it, and, therefore, that a judgment based thereon is a nullity.

We are unable to discover any provision in the laws of Virginia declaring that process served without the seal being attached is void. It is not suggested that the process was issued without authority or that the summons was filed by a person who was not authorized so to do. The whole foundation of this objection rests upon the want of a seal as affecting the sufficiency of the notice. We submit that none of the authorities cited sustain the proposition that a defendant is to be excused from answer because there is no seal attached to the summons. At the utmost, all that could be said of this is that it is an irregularity, which if it were taken advantage of at all should be objected to in the proceedings themselves. Of this nature is such a case as *Carson Brothers vs. McChord-Collins Company*, 37 Texas Civ. App., 540, cited on page 29 of appellant's brief, wherein the writ was directly attacked, and not made the subject of attack in a collateral proceeding.

Seventh. It is said that the summons was defective in that it did not state with sufficient certainty the place at which the defendant was required to appear.

It will appear that the suit was brought in the court of law and chancery of the city of Norfolk, and that it was addressed to the "Sergeant of the City of Norfolk," and that

it commanded the defendant to appear at the clerk's office of the court named of the city of Norfolk. Jurisdiction may have extended to the counties named in appellant's brief (p. 32), but it does not appear that the defendant was to go anywhere save to the clerk's office of the city of Norfolk.

Eighth. It is objected that a command to appear "on the first Monday in Feb., 1897," was insufficient, the abbreviation not having been passed upon by any court as sufficient to indicate the month of February.

We are bound to believe that the objection is made in good faith and that the appellant's attorney feels that Feb'y should have been used instead of Feb. We cannot ourselves, however, treat the objection seriously.

Ninth. It is said that the summons was defective as not showing the docket number of the case and not giving the name of the plaintiff's attorney.

To these propositions no authority whatsoever is cited, and we need not wonder. There is no claim that the writ is not in the customary form prescribed by the law and practice of Virginia, and, so being, no ground of objection exists.

Tenth. It is said that the return of service did not show that the officer used due diligence to find the defendant.

It is argued that the officer not finding the defendant January 18, 1897, he should again have tried before making his return.

The statute, however, does not require a show of due diligence on the part of the officer before serving upon his wife. We have already cited the Virginia statute, which does not require an affirmative showing on the part of the officer, and the recital of the manner of service is practically in the terms of the statute. The authorities cited upon this point

by the appellant are to be found referred to in 19 Enc. of Pleading and Practice, page 622, reference to which shows that in the absence of the defendant service at the residence would be sufficient.

It is to be noted in this general discussion that the appellant has confused substituted service allowed by statute upon persons having a domicile within the State with the constructive service applicable only when a defendant is a non-resident, a distinction which is clearly indicated on pages 623, 632, 19 Enc. of Pleading and Practice, and ignores the distinctions which exist in the law as applicable to the two systems of service. The return of the officer sufficiently shows, notwithstanding the attempt to criticise it, that service was had on Nellie A. Degge; that he did not find W. W. Degge at his usual place of abode, and that the service was had on his wife, she being there (necessarily at his usual place of abode) and she possessing the other necessary characteristics in order to receive the substituted service.

Eleventh. It is stated that it was the duty of the clerk to dismiss the proceeding unless within one month after the return of process the declaration had been filed, even although none of the defendants had appeared.

The exact language of the statute is as follows:

“When Clerk to Dismiss Suit.—If one month elapse after the process is *returned executed* as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared.”

It is said that the clerk failed to perform his ministerial duty in that at the expiration of one month, no declaration having been filed, he continued the cause, subsequently receiving the declaration, and it is said that his failure to comply with the express provisions of the statute rendered the judgment null and void. To sustain this, the brief cites

Buchanan *vs.* King's Heirs, 22 Gratt., 414; Kinsey *vs.* Ford, 38 Barbour, 195, and to these authorities appellant's counsel have added Wickham *vs.* Green, 111 Va., 199, and Jennings *vs.* Pocahontas, etc., 76 S. E., 298.

We believe that the appellant has seriously misapprehended the effect of the Virginia cases. For instance, taking one of the latest, in Wickham *vs.* Green, 111 Va., 199, failure of clerk to dismiss after thirty days is not treated as equivalent to a dismissal, but an omission that the trial court has control over. The court says:

"It is true that the reestablishment of a case at the following term, which has been dismissed at rules for want of a declaration, may be regarded as a matter of course, provided the effect of such reestablishment is to place the case in the position it would have occupied but for the *irregularity* of the clerk's conduct, or for good cause shown where there has been no misprision by the clerk. This we think is the rule fairly deducible from the cases of Southall *vs.* Exchange Bank, 12 Gratt., 315; Wall *vs.* Atwell, 21 Gratt., 401; Alvis *vs.* Johnson, 1 Va. Dec., 381, and So. Express Company *vs.* Jacobs, 109 Va., 27, 63; S. E., 17."

Twelfth. Section 3209 of the Virginia Code is relied upon as requiring that "in any case wherein there could be a judgment or decree for money on motion, such motion shall be after ten days' notice, unless some other time be specified in the section of the statute giving such motion."

To sustain the application attempted to be given of this section appellant has cited no authority and perhaps very naturally could cite none. Manifestly the man who is in default is not entitled to further notice of the taking of any judgment. To require this would be equivalent to requiring a double citation before judgment. If he had seen fit to appear for any purpose, then it might well be that notice should be had; but having once been served with notice,

having ignored it, and failed to come into court, no reasonable construction of the statute would call for a further notification.

Thirteenth. It is said that an inquiry of damages was necessary before judgment could be entered.

We are at a loss to know the ground of the appellant's suggestion, section 3285, for instance, commencing as follows:

"There need be no such inquiry in any action upon a bond or other writing for the payment of money or against the drawer or endorser of a bill of exchange, or negotiable note," etc.

Fourteenth. It is said that a judgment was unauthorized because an examination of the record discloses that the declaration in Virginia was unverified, that it fails to allege that the note sued on was delivered to the plaintiff, or that he was the owner and holder of the note, or that it was produced in court before judgment was entered.

It is evident that the case cited from Texas, on page 40 of appellant's brief to sustain this position (*Moody vs. Bengé*, 28 Texas, 547), was one which if applicable at all was so in a direct proceeding, and not in a collateral attack on a judgment, and that if appellant's point had any foundation in a direct application it could have none whatever in the case at bar.

Fifteenth. It is urged that the court below erred in sustaining plaintiff's demurrer to the defendant's fifth plea.

The fifth plea recited that the judgment sued on was obtained through fraud practiced by the plaintiff upon the two defendants, who had since the beginning of this action instituted a suit in equity to have the judgment declared to be fraudulent and void, which suit it was recited was now pend-

ing in the United States Circuit Court for the Eastern District of Virginia. The suit referred to in Virginia, as the plea itself states, was filed after these proceedings were commenced. No process appears to have been served at any time upon the plaintiffs herein and no injunction to have issued against them. To assume, therefore, that a defendant by the mere institution of a later action in another jurisdiction, claiming fraud (the details of which are not in anywise made known to the court here), seems to us entirely untenable, and we are not surprised that no authorities are cited to sustain such position and no argument made.

Conclusion.

Summing up all of the foregoing objections once more, we submit that it is evident that such of them as might have had any validity whatsoever could only have had such validity in a direct proceeding and could not operate in a collateral proceeding to enforce a judgment once allowed to be obtained.

Respectfully submitted.

JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
Plaintiff's and Appellee's Counsel.

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1913.

No. 2542.

WILLIAM W. DEGGE, APPELLANT,

vs.

WILLIAM J. BAXTER, JR., TRUSTEE FOR FRANCIS
HATTON, EZEKIEL VANCE, CHARLES W. FENTRESS,
WILLIAM H. H. TRICE, AND EDWARD SPALDING.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 5, 1913.

PRINTED MAY 12, 1913.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1913.

No. 2542.

WILLIAM W. DEGGE, APPELLANT,

vs.

WILLIAM J. BAXTER, JR., TRUSTEE FOR FRANCIS
HATTON, EZEKIEL VANCE, CHARLES W. FENTRESS,
WILLIAM H. H. TRICE, AND EDWARD SPALDING,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2542.

WILLIAM W. DEGGE, Appellant,
vs.
WILLIAM J. BAXTER, JR., Trustee, &c.

a Supreme Court of the District of Columbia.

At Law. No. 51403.

WILLIAM J. BAXTER, JR., Trustee for Francis Hatton, Ezekiel Vance,
Charles W. Fentress, William H. H. Trice, and Edward Spalding,

vs.

WILLIAM W. DEGGE and NELLIE A. DEGGE.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Amended Declaration.

Filed March 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51403.

WILLIAM J. BAXTER, JR., Trustee for Francis Hatton, Ezekiel Vance,
Charles W. Fentress, William H. H. Trice, and Edward Spalding,

vs.

WILLIAM W. DEGGE and NELLIE A. DEGGE.

The plaintiff, William J. Baxter, Jr., Trustee for Francis Hatton, Ezekiel Vance, Charles W. Fentress, William H. H. Trice and Edward Spalding, sues the defendants William W. Degge and Nellie A. Degge, for money payable by the defendants to the plaintiff for that

the said plaintiff, by the name of W. J. Baxter, Jr., Trustee for Francis Hatton, E. Vance, C. W. Fentress, W. H. H. Trice and Edward Spalding, by the consideration and judgment of the Court of Law and Chancery of the City of Norfolk, State of Virginia, the same being a court of general jurisdiction, on, to-wit, the 31st day of March, A. D. 1897, recovered a judgment against the said defendants, by the names of W. W. Degge and Nellie A. Degge, in the sum of Forty-five Hundred (4500.00) Dollars, with interest thereon at the rate of six per centum per annum from the 31st day of December, 1896 until payment, and Twelve and 25/100 (12.25) Dollars costs of suit, less a credit of Thirteen Hundred and Seventy-five and 7/100 (1375.07) Dollars as of January 6, 1897, as by the record thereof in the said court appears, a copy of which record, duly authenticated, the plaintiff now here in court produces, and which said debt and costs amounts to a large sum, to-wit, Forty-five Hundred (4500.00) Dollars, less a credit of Thirteen Hundred and Seventy-five and 7/100 (1375.07) Dollars as of January 6, 1897, with interest as aforesaid from the 31st day of December, A. D. 1896 and Twelve and 25/100 (12.25) Dollars, costs of suit.

And the plaintiff further says that the said judgment is in full force and not appealed from, reversed, annulled, or satisfied, and thereby an action has accrued to the plaintiff to demand and have from the defendants the amount of the said judgment as aforesaid, yet the said defendants and each of them although often requested, have not paid the said sum or sums or any part thereof to the plaintiff or to anyone on his behalf, but so to do have wholly refused and still refuse. Nor has anyone on said defendants' behalf, or on behalf of either of them, paid said judgment, or any part thereof.

Wherefore, the said plaintiff brings this suit and claims the sum of Forty-five Hundred (4500.00) Dollars, with interest thereon at the rate of six per centum per annum from the 31st day of December, 1896, until paid, less a credit of Thirteen Hundred and Seventy-five and 7/100 (1375.07) Dollars as of January 6, 1897, and Twelve and 25/100 (12.25) Dollars costs together with the costs of this suit.

RALSTON, SIDDONSON & RICHARDSON,
Plaintiff's Attorneys.

3

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the date of service hereof; otherwise judgment.

RALSTON, SIDDONSON & RICHARDSON,
Plaintiff's Attorneys.

Pleas.

Filed April 19, 1909.

* * * * *

And now comes William W. Degge, one of the defendants in the above-entitled cause, and for plea to the plaintiff's amended declara-

tion, filed herein, says there is no record of the said supposed recovery as it is in the said amended declaration mentioned, in the manner and form as the said plaintiff hath in his said amended declaration al- service hereof; otherwise judgment.

2. And for a further plea to said amended declaration this defend- ant says that the plaintiff ought not to have or maintain this action against him, because he says, that he was never at any time served with any process in the suit wherein the judgment in the plaintiff's said amended declaration mentioned was obtained, and that he re- ceived no notice respecting said suit until long after said supposed judgment was rendered; and that he never in any manner whatso- ever appeared in said suit, in person or by attorney, or in any wise submitted to the jurisdiction of the Court which rendered said
4 supposed judgment, by reason whereof the said court had no jurisdiction of the person of this defendant,—and this the de- fendant is ready to verify.

3. And for a further plea to said amended declaration this defend- ant says that the plaintiff ought not to have or maintain this action against him, because he says, that at the time of the institution of the suit in which the supposed judgment sued on herein was obtained, it was provided in and by the laws of the State of Virginia that if any defendant be not found at his usual place of abode, he might be served with process by delivering a copy of the process, “and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years.”

This defendant says that no information whatever as to the purport of the summons or process issued in the aforesaid suit was ever given to the defendant Nellie A. Degge, on whom a copy of said summons or process is alleged to have been served, and that the said summons or process was never called to this defendant's attention, and that this defendant did not, nor did the said Nellie A. Degge, receive any notice, information, or intimation respecting said suit, until the spring of the year A. D. 1908, when this defendant received a letter from a firm of attorneys of the city of Denver, in the State of Colo- rado, to whom the said supposed judgment had been sent by the plaintiff, for collection, demanding payment of said supposed judg- ment,—by reason whereof the court which rendered said supposed judgment was without jurisdiction of the person of this defendant,— and this the defendant is ready to verify.

5 4. And for a further plea to said amended declaration this defendant says that the plaintiff ought not to have or main- tain this action against him, because he says, that the summons or process was returned in the suit wherein the supposed judgment sued on herein was obtained, on the 18th day of January, A. D. 1897, and that the plaintiff first filed his declaration in said suit on the first Monday in March, A. D. 1897; that at the time of the institution of said suit it was, and still is, provided in and by the laws of the State of Virginia, as follows:

“SEC. 3241. When Clerk to Dismiss Suit.—If one month elapse after the process is returned executed as to any one or more of the de-

fendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared."

This defendant says that under and by virtue of said provisions of said laws, it became and was the ministerial duty of the clerk of the court in which said supposed judgment was entered, upon the failure of the plaintiff to file his declaration within one month after said summons or process was returned in said suit, to forthwith enter said suit dismissed; yet the clerk of said court, in disregard of his duty in that behalf, did not enter said suit dismissed, but, on his own motion, and without any action or order in the premises by the Judge presiding in said court, undertook and pretended to continue the case for the plaintiff to file his declaration, until the first Monday in March, A. D. 1897, when said declaration was filed, as afore-

6 Judge presiding in said court, undertook and pretended to enter the said supposed judgment, because of the supposed default of the defendants named in said suit. By reason of the premises, said supposed judgment was and is null and void and of no effect whatever,—and this the defendant is ready to verify.

5. And for a further plea to said amended declaration this defendant says that the plaintiff ought not to have or maintain this action against him, because he says, that the supposed judgment sued on herein was obtained through fraud practiced by the plaintiff upon Nellie A. Degge, and upon this defendant, and that this defendant and said Nellie A. Degge, on the 26th day of February, A. D. 1909, (since the commencement of this action) instituted a suit in equity against the plaintiff, and Edward Spalding, William H. H. Trice, and Charles W. Fentress, the plaintiff's cestuis que trust, in the Circuit Court of the United States for the Eastern District of Virginia, to have said supposed judgment declared to be fraudulent and void, and vacated and set aside, which said suit has not yet been heard, but is now pending in said court,—and this the defendant is ready to verify.

A. LEFTWICH SINCLAIR,
Attorney for Defendant.

Affidavit.

STATE OF COLORADO,
County of Boulder, ss:

7 Before me, a Notary Public in and for the County of Boulder, in the State of Colorado, having an office in the city of Boulder, in said State, personally appeared William W. Degge, who being by me first duly sworn according to law, deposes and says:

That he is a resident of the State of Colorado and has been for many years; that he is one of the defendants named in the above-entitled cause; that he denies the right of the plaintiff, William J. Baxter, Jr., Trustee, etc., to recover against him the sum claimed by him in his amended declaration, filed in the said cause, or any part thereof, and that the grounds of his defense, which are true in sub-

stance and in fact, are those set forth in the foregoing pleas to the said amended declaration, which said pleas are severally hereby expressly adopted as, and made a part of, this affidavit.

WILLIAM W. DEGGE.

Subscribed and sworn to before me, this 13th day of April, A. D. 1909.

[SEAL.]

JOHN A. WEBBER,
Notary Public.

My Commission expires Jan. 20th 1913.

Joinder in Issue.

Filed April 30, 1909.

* * * * *

The plaintiff joins issue upon the defendant's first plea.
RALSTON, SIDDONSON & RICHARDSON,
Plaintiff's Attorneys.

8 *Demurrer to Defendant's 2nd, 3rd, 4th, & 5th Pleas.*

Filed April 30, 1909.

* * * * *

The plaintiff says that the second, third, fourth and fifth pleas of the defendant William W. Degge are bad in substance.
RALSTON, SIDDONSON & RICHARDSON,
Plaintiff's Attorneys.

Memorandum.

Among the matters of law intended to be argued in support of the foregoing demurrer are that the matters and things set forth in the second plea of said defendant constitute a collateral attack upon the judgment sued upon, and that such collateral attack cannot under the law be made in this action. That the matters set forth in the third plea of the defendant also constitute a collateral attack upon said judgment, which collateral attack cannot under the law be made in this action, or at all. That the matters set forth in the fourth plea of said defendant constituted mere irregularities leading up to the procurement of the judgment sued upon, which cannot be taken advantage of collaterally and in an action such as this. That the matters set forth in the fifth plea of said defendant, alleging fraud in the procurement of said judgment are too vague and indefinite, and even were they not so, the charge of fraud cannot be invoked in a collateral proceeding such as this to destroy the effect of the judgment sued upon, and that the fact that the defendants to this action had, subsequent to its institution, filed a suit in equity against the plaintiff in a court of another jurisdiction to have

the judgment sued upon declared fraudulent and void, vacated and set aside is not a ground of defense to this action, nor can it be invoked for the purpose of suspending further proceedings herein.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

Supreme Court of the District of Columbia.

THURSDAY, June 24th, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Claibagh, Chief Justice, presiding.

* * * * *

Upon consideration of plaintiff's demurrer filed herein to defendant's pleas, it is ordered that said demurrer be, and the same is hereby overruled as to the third and fourth pleas, with leave to defendant to amend his second plea herein within twenty days hereof. Further it is ordered that said demurrer be, and the same is hereby sustained as to defendant's second and fifth pleas.

Upon motion plaintiff is hereby granted twenty days for further pleading herein.

10

Joinder in Issue on 3rd & 4th Pleas.

Filed July 8, 1909.

* * * * *

The plaintiff joins issue on the third and fourth pleas of the defendant, William W. Degge.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

Defendant's Amended Plea.

Filed July 12, 1909.

* * * * *

And now comes the defendant William W. Degge, and with leave of the Court first had and obtained, amends his second plea to the plaintiff's amended declaration, filed herein, so as to read as follows:

2. And for a further plea to said amended declaration this defendant says that the plaintiff ought not to have or maintain this action against him, because he says, that he, the defendant, was never at any time served, either personally or constructively, with any valid process or summons in the suit wherein the judgment in the plaintiff's said amended declaration mentioned was obtained; that he received no notice whatever respecting the institution of said suit, actual or constructive, and that the first information or intimation respect-

11 ing said suit was received by this defendant long after said supposed judgment was rendered; that the process or summons a copy of which is alleged to have been served on Nellie A. Degge was fatally defective, null and void, for the following reasons, among others: First, because it did not contain the christian name of this defendant; second, because it did not contain the christian name of the plaintiff; third, because the capacity in which the plaintiff sued was not sufficiently described therein; fourth because the docket number of the suit was not given therein, and fifth, because said process or summons was not under the seal of the court from which it issued. This defendant further says that he never in any manner whatever appeared in said suit, in person or by attorney, or in any wise submitted to the jurisdiction of the Court which rendered said supposed judgment. By reason whereof the said court did not have jurisdiction of the person of this defendant,—and this the defendant is ready to verify.

A. LEFTWICH SINCLAIR,
Attorney for Defendant.

Affidavit.

STATE OF COLORADO,
County of Boulder, ss:

Before me, a notary public in and for the County of Boulder, in the State of Colorado, having an office in the city of Boulder, in said State, personally appeared William W. Degge, who, being by me first duly sworn according to law, deposes and says:

12 That he is a resident of the State of Colorado and has been for many years; that he is one of the defendants named in the above-entitled cause; that he denies the right of the plaintiff, William J. Baxter, Jr., Trustee, etc., to recover against him the sum claimed by him in his amended declaration, filed in said cause, or any part thereof, and that the grounds of his defense to said amended declaration, which are true in substance and in fact, are those set forth in the foregoing amended plea thereto, which said amended plea is hereby expressly adopted as, and made a part of, this affidavit.

WILLIAM W. DEGGE.

Subscribed and sworn to before me this 6th day of July, A. D. 1909.

[SEAL.]

JOHN A. WEBBER,
Notary Public.

My Commission expires Jan. 20, 1913.

Demurrer to Amended Second Plea.

Filed July 16, 1909.

* * * * *

Now comes the Plaintiff by Ralston, Siddons & Richardson, his attorneys, and says that the amended second plea of the Defendant William W. Degge is bad in substance.

RALSTON, SIDDONS & RICHARDSON,
Plaintiff's Attorneys.

13 NOTE.—Among the questions of law that will be argued in support of the foregoing demurrer at the hearing thereon, will be that the amended second plea sets up a conclusion of law and not a fact, in that it alleges that there was no valid process or summons served upon the Defendant William W. Degge in the suit wherein the judgment, the subject of this action, was rendered against him, and that the objections also set up in said amended second plea, to the summons that was served, are at best mere irregularities that the Defendant might have taken advantage of in the original suit, but which cannot now be invoked to collaterally attack the judgment rendered against said Defendant, and herein sued upon.

RALSTON, SIDDON & RICHARDSON,
Plaintiff's Attorneys.

Notice.

WASHINGTON, D. C., *July 15, 1909.*

M.R. A. Leftwich Sinclair, Attorney for Defendant William W. Degge.

SIR: Take notice that we have set down for hearing the foregoing demurrer to the amended second plea of the Defendant William W. Degge, on the first motion day occurring five (5) days, exclusive of Sundays, after the receipt of this notice.

RALSTON, SIDDON & RICHARDSON,
Plaintiff's Attorneys.

14

(Endorsed.)

It seems to me that the general averment that the defendant was "never at any time served," &c. renders the 2nd plea good against a demurrer.

Dem. ov.

W.

Memorandum.

January 31, 1913.—Trial by Court and finding for Plaintiff for \$2111.69 and interest from July 6, 1897.

Supreme Court of the District of Columbia.

FRIDAY, *January 31st, 1913.*

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice presiding.

* * * * * * *

Upon consideration of the motion of defendant filed herein by his attorney, for a new trial, it is ordered that said motion be, and the same is hereby overruled, and judgment on the finding herein by the Court is ordered. Wherefore it is considered that the plaintiff herein

recover of the defendant, the sum of Two Thousand One Hundred
and Eleven and 69/100 Dollars (\$2111.69), with interest
15 thereon from the 6th day of July 1897, together with costs of
suit to be taxed by the clerk and have execution thereof.

From the foregoing the defendant by his attorney, in open court,
note- an appeal to the Court of Appeals, whereupon, the penalty of
a bond for costs is hereby fixed in the sum of One Hundred Dollars
(\$100.00) with leave to deposit the sum of Fifty Dollars (\$50.00) in
the Registry of the Court, in lieu of such bond.

Memorandum.

February 18, 1913.—\$50 deposited in lieu of bond on appeal.

Supreme Court of the District of Columbia.

MONDAY, *March 17th*, 1913.

Session resumed pursuant to adjournment, Hon. Daniel Thew
Wright, Justice presiding.

* * * * *

Comes now the defendant by his attorney of record and sub-
mitting to the court the Bill of Exceptions taken at the trial of this
cause, prays that the same be signed and made of record, nunc pro
tunc, which is hereby accordingly done.

16

Bill of Exceptions.

Filed March 17, 1913.

* * * * *

Be it remembered that, at the trial of the above-entitled cause, be-
fore Mr. Justice Wright, counsel for the respective parties having, by
oral stipulation, made in open Court, waived a trial by jury and con-
sented to a trial by the Court, the plaintiff to maintain and prove the
issues on his part joined, introduced in evidence, over the objection
and exception of the defendant, a certified transcript of the record
of the suit or proceedings between the plaintiff and the defendant
in which the judgment sued on herein was obtained, which said
transcript is in the words and figures following, to wit:

VIRGINIA:

Pleas Before the Court of Law and Chancery of the City of Norfolk,
at the Court House Thereof, on the 31st Day of March, 1897.

Be it remembered that heretofore, to-wit, on the 18th day of Janu-
ary, 1897, came W. J. Baxter, Jr., Trustee, Plaintiff by his Attorney
and sued out of the Clerk's Office of said Court a writ of summons in

debt against W. W. Degge and Nellie A. Degge, defendants, which, with the return thereon made, is in the words and figures following, to wit:

The Commonwealth of Virginia to the Sergeant of the City of Norfolk, Greeting:

We command you, That you summon W. W. Degge and Nellie A. Degge to appear at the Clerk's Office of our Court of Law and
 17 Chancery, of the City of Norfolk, at the Rules to be holden for the said Court, on the first Monday of Feb. 1897, to answer W. J. Baxter, Jr., trustee of a plea of debt for \$4500.00.

Damages \$50.00.

And have then and there this writ.

Witness, L. Royster, Clerk of our said Court, at his office the 18th day of January 1897, in the 121st year of our foundation.

Teste:

L. ROYSTER, C. C.

Return.

Executed this the 18th day of January, A. D. 1897 by serving a copy hereon on Nellie A. Degge. Not finding W. W. Degge at his usual place of abode this the 18th day of January 1897, I served a copy hereof on Nellie A. Degge, his wife, she being there and a member of his family over the age of sixteen years, and gave information of its purport to her.

JOHN F. LAWLER,
 By W. A. THOMPSON, *Dep'y.*

And afterwards, to-wit: At rules held in the Clerk's Office of said Court on the First Monday in February, 1897, neither party appearing, the case was continued for the plaintiff to file his declaration.

And afterwards, to-wit, At rules held in the Clerk's Office aforesaid on the second Monday in February, 1897, the parties still failing to appear, the case was again continued for the plaintiff to file his declaration.

18 And afterwards, to-wit; At rules held in the Clerk's Office aforesaid on the 1st Monday in March 1897, came the plaintiff by his Attorney, and filed his declaration against the defendants, which is in the words and figures following, to-wit:

VIRGINIA:

In the Court of Law and Chancery of the City of Norfolk.

NORFOLK CITY, *To wit:*

W. J. Baxter, Jr., Trustee for Francis Hatton, E. Vance, C. W. Fentress, W. H. H. Trice and Edward Spalding (the plaintiff in this

suit) complains of W. W. Degge and Nellie A. Degge (the defendants in this suit) who have been summoned to answer the said plaintiff of a plea that they render to the said plaintiff the sum of forty five hundred dollars, which they owe to, and unjustly detain from the said plaintiff.

And thereupon the said plaintiff says that heretofore to-wit: on the 31st day of December 1896, the said defendants made their certain note in writing bearing date the year last aforesaid, and subscribed their name thereto, by which said note they the said defendants, then promised to pay on demand after date thereof to the order of themselves forty five hundred dollars, at the Norfolk National Bank Norfolk, Va., for value received and therein waived the benefit of the Homestead Exemption as to this debt.

19 And the said W. W. Degge and Nellie A. Degge after the making of the said note and before the same became due and payable, to-wit, on the day and year last aforesaid, by writing their name on the back thereof endorsed the said note to the said plaintiff.

And the said plaintiff avers that although the said sum of \$4500.00 has according to the tenor and effect of the said note been long since due and payable, and although the said defendants have been often requested to pay the same to the plaintiff, yet the said defendants have not paid to the said plaintiff the said sum of money above mentioned, or any part thereof, but have hitherto wholly neglected and refused so to do, to the damage of the said plaintiff \$50.00 and therefore he brings suit.

SPALDING, p. q.

Whereupon, the defendants not appearing, on motion of the plaintiff by his attorney, it was ordered that judgment be entered for the plaintiff against the defendants for the debt and interest in the declaration mentioned, unless the said defendants should appear and plead to issue at the then next rules.

At which day, to-wit, At rules held in the Clerk's Office aforesaid on the second Monday in March, 1897, the defendants still failing to appear, on motion of the plaintiff, by his attorney, it was ordered that the last order made against them in this cause be confirmed.

And now at this day, to-wit, In the Court of Law and Chancery of the City of Norfolk on the 31st day of March, 1897 (that being the same day and year as that herein first mentioned).

20 W. J. BAXTER, JR., Trustee for Francis Hatton, E. Vance,
C. W. Fentress, W. H. H. Trice, and Edward Spalding,
Plaintiff,

vs.

W. W. DEGGE and NELLIE A. DEGGE, Defendants.

In Debt.

The judgment obtained at the rules not having been set aside, and the plaintiff being now entitled to a final judgment:

It is therefore considered that the plaintiff recover against the defendants Forty Five Hundred dollars (\$4500.00) with interest thereon to be computed after the rate of six per centum per annum from the 31st day of December 1896 until payment and his costs by him about his suit in this behalf expended.

And the said defendants in mercy, &c. homestead waived, Credit \$1375.07 as of Jan'y 6, 1897.

Teste:

JUNIUS A. COLEMAN, *D. Clerk.*

Costs.

Clerk	\$3.75
Att'y	2.50
S'g't	5.00
W. T.....	1.00
	\$12.25

S. & B., *p. q.*

STATE OF VIRGINIA,

City of Norfolk, To wit:

21 I, James V. Trehy, Clerk of the Court of Law and Chancery of the said City of Norfolk and State of Virginia, do hereby certify that the foregoing and annexed copy of the record in the case of W. J. Baxter, Jr., Trustee vs. W. W. Degge and Nellie A. Degge, is a true abstract from the Records of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 31st day of March, A. D. 1908, in the 132d year of the Commonwealth of Virginia.

[SEAL.]

JAMES V. TREHY, *Clerk.*

STATE OF VIRGINIA,

City of Norfolk, To wit:

I, William Bruce Martin, Judge of the Court of Law and Chancery of the said City of Norfolk, in the State of Virginia, do certify that James V. Trehy, who hath given the preceding certificate, is Clerk of the said Court, and that his said attestation is in due form.

Given under my hand, this 31st day of March, A. D. 1908.

WILLIAM BRUCE MARTIN,
*Judge of the Court of Law and Chancery
of the said City of Norfolk.*

STATE OF VIRGINIA,

City of Norfolk, To wit:

22 I, James V. Trehy, Clerk of the said Court, of the said City of Norfolk, and State of Virginia, do hereby certify that Hon. William Bruce Martin, whose genuine signature appears to the certificate above, is the only Judge of the said Court, and that all his official acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 31st day of March, A. D. 1908, in the 132nd year of the Commonwealth of Virginia.

[SEAL.]

JAMES V. TREHY, *Clerk*.

And, thereupon, the plaintiff, by his counsel, announced that he had no further evidence to offer, and rested his case.

And, thereupon, counsel for the defendant, on the foregoing, which was all of the evidence in the case, moved the court to find and enter judgment in favor of the defendant, upon the following grounds, to wit:

1. Because the judgment sued on was not properly attested or certified.

2. Because it appears upon the face of the record that the defendant was never at any time served with any process or notice in the suit wherein the judgment sued on was obtained, and that the defendant never in any manner appeared in said suit, in person or by Attorney, or in any wise submitted to the jurisdiction of the Court, which rendered said judgment, by reason whereof the said Court did not have jurisdiction of the person of the defendant.

3. Because the record does not show that, at the time of the supposed service of process in the suit in which the judgment sued on was obtained, the defendant was a resident of the State of Virginia.

4. Because there is a fatal variance between the summons and the declaration in the suit in which the judgment sued on was obtained, in that the plaintiff, by said summons, sued and proceeded in his individual capacity against the defendant, while, by his declaration, of the filing of which the defendant was given no notice, the plaintiff proceeded and recovered judgment against the defendant in a representative capacity.

5. Because the judgment sued on was entered prematurely.

6. Because the promissory note mentioned in the declaration filed by the plaintiff in the suit in which said judgment was obtained was never filed or exhibited in said suit.

7. Because the delivery of the promissory note mentioned in the declaration filed in the suit wherein the judgment sued on was obtained was not set up or alleged in said declaration.

8. Because the declaration filed in the suit in which the judgment sued on was obtained was not verified.

9. Because the summons issued in the suit in which the judgment sued on was obtained, was fatally defective, null and void, for the following reasons, to wit:

(a) Because the christian name of the plaintiff was not given therein.

(b) Because the christian name of the defendant was not given therein.

(c) Because the docket number of the case was not given therein.

(d) Because the name of the plaintiff's Attorney was not given therein.

- (e) Because the place of appearance was not given therein.
- (f) Because the said summons was not under the seal of the Court from which it was issued.
- (g) Because the time at which the defendant was commanded to appear was not stated in said summons with sufficient clearness.
- (h) Because the residence of the defendant was not stated in said summons.

10. Because the return of service in the suit in which the judgment sued on was obtained is defective and legally insufficient, in that it does not show compliance with all the requirements of the law of the State of Virginia and fails to show service in said State of Virginia, and, further, because said return does not show the officer's inability to make personal service or that the officer used due diligence to find the defendant.

But the Court overruled said motion to find and enter judgment in favor of the defendant and found and entered judgment in favor of the plaintiff; to which ruling of the Court, the defendant, by his counsel, then and there duly excepted and said exception was noted at the time upon the minutes of the Court.

25 In the course of the argument of the foregoing motion, counsel for the respective parties orally stipulated and agreed that the Court in disposing of said motion might take judicial notice of the laws of the State of Virginia.

And, thereupon, the defendant, by his counsel, announced that he did not desire to offer any evidence, and rested his case.

And, thereupon, counsel for the respective parties entered into and submitted to the Court the following stipulation, in writing:

"It is agreed by and between Attorneys for the plaintiff and for the defendant, William W. Degge, that, if the plaintiff is entitled to judgment, judgment should be entered in the above-entitled cause, in favor of the plaintiff, the amount for which such judgment should be entered, after the allowance of all just credits, is Two Thousand One Hundred and Eleven and Sixty-Nine One-Hundredths (2,111.69) Dollars, with interest from January 6, 1897, until paid, together with the costs of the judgment had in the Law and Chancery Court of Norfolk, Virginia, said costs being \$12.25, and together with the costs of this suit."

The foregoing exceptions were duly noted and allowed by the Court at the trial, and at the request of counsel for the defendant, this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

26 Witness my hand and seal this 17th day of March, A. D. 1913.

DAN THEW WRIGHT, [SEAL.]
Justice of the Supreme Court of the District of Columbia.

I consent.

J. H. RALSTON,
For Pl'ff.

Assignment of Errors.

Filed March 20, 1913.

* * * * *

And now comes the appellant, William W. Degge, and assigns the following errors in the above-entitled cause.

The Court erred:

1. In sustaining the plaintiff's demurrer to the defendant's fifth plea.
2. In admitting and receiving in evidence, over the objection of the defendant, the transcript of the record of the suit or proceedings in which the judgment sued on was recovered.
3. In finding for the plaintiff, over the objection of the defendant.
4. In not finding and entering judgment in favor of the defendant.
5. In overruling the defendant's motion for a new trial and entering judgment in favor of the plaintiff.

A. LEFTWICH SINCLAIR,
Attorney for Appellant.

27

Designation of Record.

Filed March 20, 1913.

* * * * *

In preparing the transcript of record for the Court of Appeals in the above-entitled cause, the Clerk will please include the following:

1. Amended declaration.
2. Pleas and affidavit.
3. Joinder in issue on defendant's first plea.
4. Demurrer to 2nd, 3rd, 4th and 5th pleas.
5. Order overruling demurrer to 3rd and 4th pleas and sustaining demurrer to 2nd and 5th pleas and granting leave to defendant to amend 2nd plea.
6. Joinder in issue on 3rd and 4th pleas.
7. Amendment to 2nd plea.
8. Demurrer to 2nd amended plea.
9. Order overruling demurrer to 2nd amended plea.
10. Memo. showing finding of Court for plaintiff.
11. Memo. showing overruling of motion for new trial, judgment for plaintiff, appeal by defendant, in open Court, fixing of appeal bond and amount of money to be deposited in lieu of appeal bond.
12. Memo. showing deposit of \$50.00 with Clerk, in lieu of appeal bond.
13. Memo. showing extension of time for filing transcript in Court of Appeals.

16 WILLIAM W. DEGGE VS. WILLIAM J. BAXTER, JR., TRUSTEE, ETC.

14. Bill of exceptions.
15. Assignment of errors.
16. This designation.

A. LEFTWICH SINCLAIR,
Attorney for Appellant.

28 Service of copy of the foregoing designation and copy of the appellant's assignment of errors hereby acknowledged, this 18th day of March, 1913.

RALSTON, SIDDON & RICHARDSON.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51403 at Law, wherein William J. Baxter, Jr., Trustee for Francis Hatton, et al. is Plaintiff, and William W. Degge and Nellie A. Degge are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of March, 1913.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2542. William W. Degge, appellant, vs. William J. Baxter, Jr., trustee, &c. Court of Appeals, District of Columbia. Filed Apr. 5, 1913. Henry W. Hodges, clerk.

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